

United States
Circuit Court of Appeals

For the Ninth Circuit. 6

FIFTH STREET BUILDING, a Corporation,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petitions to Review an Order of the United States
Board of Tax Appeals.

FILED

JUL 11 1933

PAUL P. O'BRIEN,
CLERK

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FIFTH STREET BUILDING, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

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C. J. DUGGAN, C. P. A.
C. J. MILLER, Esq.,
C. E. WATKINSON, Esq.,
A. C. MACKAY, Esq.

For Comm'r.:

JOHN D. FOLEY, Esq.,
S. S. FAULKNER, Esq.,
M. B. LEMING, Esq.,
CHESTER GWINN, Esq., and
JOHN R. GASKINS, Esq.

Docket No. 16627

DOCKET ENTRIES

1926

- Jun. 2—Petition received and filed.
“ 4—Copy of petition served on Solicitor.
“ 4—Notification of receipt mailed taxpayer.
Jul. 17—Answer filed by Solicitor.
Aug. 24—Copy of answer served on taxpayer. General Calendar.
Oct. 1—Hearing date 10/19/26.
Sep. 28—Motion to make and file a better statement of defense and to strike out, filed by taxpayer.

1926

- Oct. 2—Copy of motion served on General Counsel.
“ 19—Hearing before Mr. Love on motion. Respondent given 30 days to file amended answer.
“ 22—Ordered that respondent be allowed until 11/18/26 to file amended answer signed and filed. Both sides notified.
- Nov. 19—Amended answer filed by General Counsel. Copy served 12/3/26.

1927

- Jan. 12—Motion to make and file better statement and strike out filed by taxpayer.
“ 19—Hearing set on motion for 2/15/27.
“ 20—Copy of motion served on General Counsel.
- Feb. 2—Motion to amend petition embodying amendment filed by taxpayer.
“ 5—Granted. Both sides notified.
“ 8—Copy of motion and amended petition served on General Counsel.
“ 15—Hearing had before Mr. Korner on petitioner's motion to require better statement of defense or further amendment to answer. Answer amended by statement—denied as to striking answer—amended petition allowed and served on respondent at hearing.
“ 16—Ordered motion to strike amended answer be denied also amended petition be received and filed and amended answer be accepted as an answer to petition as amended signed and filed. Both sides notified.

1927

- Mar. 16—Motion to assign to Los Angeles Circuit Calendar filed by taxpayer.
“ 17—Granted. Both sides notified.

1928

- Feb. 20—Hearing set 4/27/28, Los Angeles, California.
Apr. 13—Application for subpoena duces tecum filed by taxpayer.
“ 14—Subpoena issued. Subpoena served 4/17/28.
“ 26—Hearing had before Mr. Milliken—continued to Los Angeles, California field calendar.
“ 26—Order of continuance to the next field calendar in California, entered. [1*]

1929

- Mar. 16—Stipulation as to facts filed.

1930

- Mar. 19—Hearing set May 26, 1930, Los Angeles, California.
May 26—Hearing had before Stephen J. McMahon, Div. 16 on merits. Submitted—petitioner's brief due Aug. 24, 1930—reply Oct. 7, 1930. Respondent's brief due Sept. 23, 1930.
Jun. 24—Transcript of hearing of May 26, 1930 filed.
Aug. 11—Motion for 10 day extension to file brief filed by taxpayer. 8/12/30 granted to 9/7/30.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1930

- Sep. 5—Brief filed by taxpayer.
“ 9—Copy of brief served on General Counsel.
“ 23—Brief filed by General Counsel.
Oct. 7—Reply brief filed by taxpayer. 10/8/30
copy served on General Counsel.

1931

- Nov. 23—Findings of fact and opinion rendered,
Stephen J. McMahon, Div. 16. Judgment
will be entered under Rule 50.

1932

- Jan. 6—Notice of settlement filed by General
Counsel.
“ 9—Hearing set Jan. 27, 1932 on settlement.
“ 12—Motion for reconsideration of decision of
Nov. 23, 1931, filed by taxpayer.
“ 25—Motion to reconsider and amend decision
and memorandum in support thereof filed
by General Counsel.
“ 25—Motion to continue hearing for two weeks
filed by taxpayer. 1/25/32 continued to
2/10/32.
“ 25—Notice of appearance of Richard B.
Barker as counsel filed.
“ 26—Motion to substitute attached notice of
settlement in place of that filed Jan. 6,
1932 filed by General Counsel.
“ 28—Copy of motion and corrected notice of
settlement served on taxpayer.
Feb. 5—Notice of appearance of O. R. Folsom-
Jones as counsel filed.

1932

- Feb. 5—Objections to motion and corrected notice of settlement filed by Commissioner.
- “ 9—Motion for continuance to March 2, 1932 filed by taxpayer. 2/9/32 granted.
- “ 29—Brief on motion for reconsideration filed by General Counsel.
- Mar. 2—Hearing had before Mr. McMahon on contested settlement under Rule 50.
- “ 5—Second motion for rehearing and reconsideration of decision filed by taxpayer.
- “ 10—Corrections to be attached to above motion filed by taxpayer.
- “ 15—Order denying motions of 1/12/32 and 1/25/32 to reconsider and 1/26/32 to correct notice of settlement and 3/5/32 to reconsider; recomputations filed 1/6/32 and 2/25/32 be approved entered. Memorandum attached.
- “ 16—Decision entered, Stephen J. McMahon, Div. 16.
- “ 22—Transcript of hearing of March 2, 1932 filed.
- Sep. 13—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.
- “ 13—Proof of service filed by taxpayer. [2]
- Nov. 2—Order enlarging time to Dec. 13, 1932 for preparation of evidence and delivery of record entered.
- “ 11—Stipulation to consolidate with 45537 and for only one record filed.

1932

Nov. 19—Motion for extension to Jan. 15, 1933 to prepare statement and transmit record filed by taxpayer.

“ 19—Order enlarging time to Jan. 15, 1933 for preparation of evidence and delivery of record entered.

Dec. 10—Praecipe with proof of service thereon filed.

“ 10—Statement of evidence lodged.

“ 13—Notice of lodgment of statement and of hearing Dec. 28, 1932 to approve statement filed by taxpayer.

“ 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. Continued to Jan. 11, 1933.

“ 28—Order of continuance to Jan. 11, 1933 entered.

1933

Jan. 11—Order enlarging time to 3/16/33 for preparation of evidence and delivery of record entered.

“ 11—Hearing had before Mr. McMahon on approval of statement of evidence. Continued to 3/1/33 for further hearing. Statement of evidence filed.

“ 11—Order of continuance to March 1, 1933 for hearing on approval of statement of evidence entered.

“ 12—Praecipe filed by General Counsel.

“ 12—Proof of service of praecipe and alternative statement of evidence filed.

1933

Jan. 12—Motion to substitute praecipe and alternative statement filed by General Counsel.

“ 16—Transcript of hearing Jan. 11, 1933 filed.

Feb. 17—Motion to advance hearing to Feb. 16, 1933 filed by taxpayer. 2/8/33 granted.

Feb. 16-17—Hearing had before Mr. McMahon on approval of statement of evidence. Held over from Feb. 16 to Feb. 17, 1933. C. A. V. Time of appeal extended to April 15, 1933. Memorandum filed.

“ 17—Order enlarging time to April 15, 1933 for preparation of evidence and delivery of record entered.

Mar. 6—Transcript of hearing Feb. 17, 1933 filed.

“ 21—Order that the statement of evidence lodged on 12/10/32 be corrected and changed entered.

Apr. 14—Order enlarging time to May 15, 1933 for preparation of evidence and delivery of record entered.

May 12—Order enlarging time to June 10, 1933 for preparation of evidence and delivery of record entered.

“ 12—Statement of evidence approved and ordered filed.

June 7—Order enlarging time to July 15, 1933 for transmission and delivery of record entered. [3]

APPEARANCES

For Taxpayer:

C. J. MILLIRON, ESQ.,
CHARLES E. WATKINSON, ESQ.,
A. C. MACKAY, ESQ.,
E. J. BRASHEARS, ESQ.,
RICHARD B. BARKER, ESQ.,
O. R. FOLSOM-JONES, ESQ.,

For Comm'r.:

M. B. LEMING, ESQ.,
CHESTER GWINN, ESQ.,
JOHN R. GASKINS, ESQ.,

Docket No. 45537

DOCKET ENTRIES.

929

Aug. 26—Petition received and filed. Taxpayer notified. (Fee paid)

“ 27—Copy of petition served on General Counsel.

Oct. 8—Answer filed by General Counsel.

“ 25—Copy served on taxpayer—Circuit Calendar.

930

Mar. 19—Hearing set May 26, 1930, Los Angeles, California.

May 26—Hearing had before Mr. McMahon on merits—submitted—Petitioner's brief due Aug. 24, 1930—reply Oct. 7, 1930. Respondent's brief due September 23, 1930.

1930

Jun. 24—Transcript of hearing of May 26, 1930 filed.

Aug. 11—Motion for 10 day extension to file brief filed by taxpayer. See 16627.

“ 12—Motion granted to September 7, 1930.

Sep. 5—Brief filed by taxpayer.

“ 9—Copy of brief served on General Counsel.

“ 23—Brief filed by General Counsel.

Oct. 7—Reply brief filed by taxpayer 10/8/30 copy served on General Counsel.

1931

Nov. 23—Findings of fact and opinion rendered, Stephen J. McMahon, Div. 16. Judgment will be entered under Rule 50.

1932

Jan. 6—Notice of settlement filed by General Counsel.

“ 9—Hearing set January 27, 1932 on settlement.

“ 12—Motion for reconsideration of decision of Nov. 23, 1932, filed by taxpayer.

“ 25—Notice of appearance of Richard B. Barker as counsel filed.

“ 25—Motion for continuance of two weeks, filed by taxpayer. 1/25/32 granted to 2/10/32.

“ 25—Motion to reconsider and amend decision and memorandum in support thereof filed by General Counsel.

“ 26—Motion to substitute attached notice of settlement in place of that filed Jan. 6, 1932, filed by General Counsel. 1/28/32 copy served.

- 1932
- Feb. 5—Notice of appearance of O. R. Folsom-Jones as counsel filed.
- “ 5—Objections to motion and amended notice of settlement filed by Commissioner. [4*]
- “ 9—Motion for continuance to March 2, 1932 filed by taxpayer. 2/9/32 granted.
- “ 29—Brief in support of motion for reconsideration filed by General Counsel.
- Mar. 2—Hearing had before Mr. McMahon on contested settlement under Rule 50.
- “ 5—Second motion for reconsideration and rehearing of decision of Nov. 23, 1932 filed by taxpayer.
- “ 10—Corrections to be attached to above motion filed by taxpayer.
- “ 15—Order denying motions of 1/12/32 and 1/25/32 to reconsider, and 1/26/32 to correct notice of settlement and 3/5/32 to reconsider and recomputations filed 1/6/32 and 2/25/32 be approved entered. (Memorandum attached.)
- “ 16—Decision entered, Stephen J. McMahon, Div. 16.
- “ 22—Transcript of hearing of March 2, 1932 filed.
- Sep. 13—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.
- “ 13—Proof of service filed by taxpayer.
- Nov. 2—Order enlarging time to Dec. 13, 1932 for preparation of evidence and delivery of record entered.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Nov. 11—Stipulation to consolidate with docket 16627 and for a single transcript to Circuit Court filed.

“ 19—Motion for extension to Jan. 15, 1933 to prepare statement and transmit record filed by taxpayer.

“ 19—Order enlarging time to Jan. 15, 1933 for preparation of evidence and delivery of record entered.

Dec. 10—Præcipe with proof of service thereon filed.

“ 10—Statement of evidence lodged.

“ 13—Notice of lodgment of statement and hearing on Dec. 28, 1932 to approve statement filed by taxpayer.

“ 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. Continued to January 11, 1933.

“ 28—Order of continuance to January 11, 1933, entered.

1933

Jan. 11—Hearing had before Mr. McMahon on approval of statement of evidence. Continued to March 1, 1933 for further hearing on statement of evidence. Statement of evidence filed.

“ 11—Order of continuance to March 1, 1933 for hearing on the approval of statement of evidence entered.

“ 11—Order enlarging time to March 16, 1933 for preparation of evidence and delivery of record entered.

“ 16—Transcript of hearing of Jan 11, 1933 filed.

1933

Jan. 12—Præcipe filed by General Counsel.

“ 12—Proof of service of alternative præcipe and statement of evidence filed by taxpayer.

“ 12—Motion to substitute alternative præcipe and statement filed by General Counsel.

Feb. 7—Motion to advance hearing to Feb. 16, 1933 filed by taxpayer. 2/8/33 granted.

“ 16-17—Hearing had before Mr. McMahon on approval of statement of evidence. Held over from Feb. 16 to Feb. 17, 1933. C.A.V. Time of appeal extended to April 15, 1933. Memorandum filed.

Mar. 6—Transcript of hearing of Feb. 17, 1933, filed.

“ 21—Order that the statement of evidence lodged on 12/10/32 be corrected and change entered. [5]

Apr. 14—Order enlarging time to May 15, 1933 for preparation of evidence and delivery of record entered.

May 12—Order enlarging time to June 10, 1933 for preparation of evidence and delivery of record entered.

“ 12—Statement of evidence approved and ordered filed.

June 7—Order enlarging time to July 15, 1933 for transmission and delivery of record entered. [6]

United States Board of Tax Appeals

Docket No. 16,627.

FIFTH STREET BUILDING, A Corporation,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION.

I.

The petitioner ever since the 30th day of March, 1921, has been, and is, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City of Los Angeles, County of Los Angeles, State of California, and within the Sixth Collection District of California; that on or about the 15th day of March, 1922, and within the time allowed by law, the petitioner filed its income and excess profits tax return for the year 1921 with the Collector of Internal Revenue of said Sixth Collection District of California, and said return so filed by said petition-[7] er showed a net income of \$85,170.97 and a tax due thereon of \$16,361.81; that thereafter, within the time allowed by law, the petitioner fully paid said tax; that, thereafter, and on the 19th day of April, 1926, the respondent determined that there was a deficiency in tax for the year 1921 of \$19,684.69 in respect of income and excess profits taxes imposed by law, and thereupon and on said 19th day of April, 1926, said respondent sent a notice of

said deficiency to said petitioner by registered mail, a copy of which said notice of deficiency is hereto attached marked Exhibit "A" and made a part of this amended petition; that the sixty days have not elapsed since the 19th day of April, 1926, and the petitioner files this amended petition with the Board of Tax Appeals for redetermination of aforesaid alleged deficiency.

II.

That the respondent erred in determining that there was any deficiency in tax in the sum of \$19,-84.69, or in any other amount, or at all, due from petitioner upon account of income and excess profits taxes for the year 1921, and petitioner makes the following assignments of error:

(a) Respondent erred in determining and holding the net income of the petitioner for the year 1921 was any sum in excess of \$80,897.32.

(b) Respondent erred in not holding and determining that the petitioner by inadvertence and mistake erroneously reported its net income for the year 1921 as \$85,170.97 instead of \$80,897.32, and in holding the net income to be \$87,361.96.

(c) Respondent erred in holding and determining that [8] the petitioner was not entitled to exhaustion of the value of the leasehold (referred to by the examining officer and respondent as "amortization of the ground lease") in the amount of \$6,-64.64, and in not holding that this amount should have been included as a deduction in the income tax return filed by petitioner for said year.

(d) Respondent erred in holding and determin-

ing that the invested capital which petitioner was entitled to include in its return of income and excess profits taxes for the year 1921 was only the sum of \$8,904.66, and further erred in not holding and determining that such invested capital was the sum of \$492,849.86.

(e) Respondent erred in deducting and in not allowing as a part of the invested capital of petitioner for the year 1921, the sum of \$483,945.20 upon account of stock issued in payment of a certain agreement for a lease dated November 1, 1920, entered into by and between Gladys Bilicke and A. B. C. Dohrmann as first parties and W. A. Faris and R. M. Walker as second parties, and said agreement was on the 2nd day of November, 1920, given and transferred without consideration by said W. A. Faris and R. M. Walker to C. J. Milliron, and thereafter and on the 18th day of May, 1921, said agreement was sold and assigned by said C. J. Milliron to petitioner for a consideration of \$640,000.00, which consideration was paid by petitioner issuing to C. J. Milliron 6,400 shares of its capital stock of the aggregate par value of \$640,000.00, which agreement and assignments are hereinafter more specifically referred to and set forth. [9]

(f) Respondent erred in holding and determining that there should have been eliminated from invested capital of petitioner the sum of \$483,945.20.

(g) Respondent erred in holding and determining that the provisions of Section 331 of the Revenue Act of 1921 has any application to the facts in this case.

(h) Even if the provisions of Section 331 of the Revenue Act of 1921 apply to this case then respondent erred in holding and determining that the value of the agreement to make a lease dated November 1, 1920, is for the purpose of invested capital to be included therein only in the amount of the actual cash paid for aforesaid agreement, and not at the value of said agreement on the date when acquired by the previous owner, to-wit, C. J. Milliron, by gift on the 2nd day of November, 1920.

(i) Respondent erred in holding and determining that the cost to the prior owner, to-wit, C. J. Milliron, was nothing and in not holding that the cost of acquisition to said prior owner was at least \$640,000.00.

(j) Respondent erred in holding and determining that the value of aforesaid agreement dated November 1, 1920, at the date of its assignment to petitioner for the purposes of invested capital was nothing; and further, in holding and determining that the petitioner was not entitled to include as a part of its invested capital the actual value of said agreement at the date of the assignment thereof to the petitioner, to-wit, at least the sum of \$640,000.00.

(k) Respondent erred in holding and determining that [10] said agreement for a lease dated November 1, 1920, between Gladys Bilicke and A. B. C. Dohrmann as first parties and W. A. Faris and R. M. Walker as second parties had no value and was not enforceable in the hands of anyone but the original parties thereto, when in fact and in law such agree-

ment was enforceable in the hands of assignees thereof and also had a value in the hands of such assignees.

(l) Respondent erred in holding and determining that there is owing and unpaid from the petitioner on account of income and excess profits taxes for the year 1921 an additional sum of \$19,684.69, or any other sum, or at all.

(m) Respondent erred in holding and determining that the total amount of tax due from the petitioner on account of income and excess profits taxes for the year 1921 was the sum of \$36,046.50, upon which there has been already paid the sum of \$16,361.81, leaving a balance of \$19,684.69, and in not holding and determining that the total amount of taxes so due and owing from the petitioner was the sum of \$15,149.22, upon which there has been paid the said sum of \$16,361.81, leaving a balance of overpayment of \$1,212.59.

(n) Respondent erred in not holding and determining that there has been an overassessment of \$1,212.59 upon account of income and excess profits taxes of petitioner for the year 1921.

III.

In support of said assignments of error, the petitioner alleges that petitioner is a corporation organized and created under the laws of the State of California on the 30th day of March, 1921, and ever since said last mentioned date has been, [11] and is, such a corporation having its principal place of business at the City of Los Angeles, County of Los Angeles, State of California. That among its cor-

porate powers are the following: to buy, purchase, take on lease, or by assignment of lease or sublease, or by exchange, buy, or rent or otherwise acquire or hold real or personal property improved or unimproved; to improve, manage and operate real property; to construct, reconstruct and alter houses, offices, and store buildings, stores, department stores and to operate, manage, lease and rent the same or any part thereof; to develop real property generally, to acquire by purchase, assignment, or otherwise, leases and ground leases of improved or unimproved property, and to develop the property covered by said leases, and to sell, or otherwise dispose of same; together with other and all powers necessary to carry into effect the purposes for which the petitioner was organized and incorporated.

IV.

Petitioner further alleges that on the 1st day of November, 1920, Gladys Bilicke and A. B. C. Dohrmann were the duly appointed, qualified and acting executors of the Last Will and Testament of A. C. Bilicke, deceased, under appointment of the Superior Court of the State of California, in and for the County of Los Angeles, and said estate owned real property in the City of Los Angeles, State of California, the same being a portion of Lots 4 and 5, in Block 14, of the Ord Survey in the City of Los Angeles, County of Los Angeles, State of California, substantially described as follows: [12]

That portion of Lot Four (4) in Block Fourteen (14) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of Cali-

fornia, as per map recorded in Block 53, page 66, et seq., Miscellaneous Records of said County described as follows:

Beginning at the North East corner of said lot; thence Southerly along the Westerly line of Broadway forty-eight (48) feet; thence at right angles Westerly one hundred fifty-five (155) feet to an alley; thence at right angles Northerly along said alley forty-eight (48) feet to the North line of said Lot; thence at right angles Easterly one hundred fifty-five (155) feet to the point of beginning.

Part of Lot Five (5) in Block Fourteen (14) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to-wit:

Beginning at the point of intersection of the Easterly line of said Lot with the center line, produced Easterly of the party wall described in the agreement between Aaron M. Ozman and William H. Perry, dated February 5, 1896, and recorded in the Recorder's office of said County, in Book 1063 of Deeds, page 133, said point being sixty (60) feet, a little more or less, Southerly from the intersection of said Easterly line with the Southerly line of Fifth Street; thence running Westerly along said produced center line and along the center line of said wall, one hundred twenty-two (122) feet and four (4) inches, more or less, to the intersection of said center line with the center line of the party wall described in the agree-

ment aforesaid, which runs Southerly from Fifth Street; thence Northerly along said center line sixty (60) feet, more or less, to the Southerly line of Fifth Street at a point one hundred twenty-two (122) feet and four (4) inches Westerly from its intersection with the Westerly line of Broadway as originally established, thence Westerly along said line of Fifth Street forty-two (42) feet and eight (8) inches, more or less, to the Easterly line of the alley running Northerly and Southerly through said Block; thence Southerly along the Easterly line of said alley sixty (60) feet, more or less, to an angle in said line; thence [13] continuing along said line of alley South twenty-eight (28) degrees (28°), thirty-six and one-half minutes (36½') West sixty and thirty-nine hundredths (60 39/100) feet, more or less, to the Southerly line of Lot five (5) herein recited; thence along said Southerly line, Easterly one hundred fifty-five (155) feet, more or less, to the Southeast corner of said Lot Five (5); thence Northerly along the Easterly line of the same sixty (60) feet, more or less, to the point of beginning.

Subject, however, to all existing party wall agreements and party wall rights, if any, and also to an agreement not to use the east five (5) feet of the portion of all premises fronting on roadway for any permanent improvement.

That on said first day of November, 1920, said Gladys Bilicke and A. B. C. Dohrmann as said executors, and as first parties thereto, made and entered

into a certain agreement with W. A. Faris and R. M. Walker, as second parties thereto, for a lease of said described property wherein it was provided as follows: that said first parties as said executors would forthwith cause to be organized under the laws of the State of California, a corporation having some suitable name, and would immediately institute and take such proceedings as might be permitted by law to cause the real property to be distributed pursuant to said will and to be acquired by said corporation or by said corporation and said Gladys Bilicke, to the end that said Gladys Bilicke individually and as the guardian of her three minor children should own all of the issued stock of said corporation, and that said corporation, or said corporation and Gladys Bilicke, would make a valid lease of said property for the term of ninety-nine years, and said first parties further agreed that they [14] would use every endeavor to promptly accomplish the above and foregoing results; said W. A. Faris and R. M. Walker, as said second parties, agreed that they would cause a corporation to be organized under the laws of the State of California, having some suitable name, for the purpose of leasing said real property for a term of ninety-nine years commencing January 1, 1921, and said first parties agreed when said real estate should have been acquired by the corporation to be organized by them as aforesaid, they would cause such corporation, or such corporation and said Gladys Bilicke, to execute as lessor or lessors an indenture of lease substantially in form attached to said agree-

ment; said second parties further agreed that they would thereupon cause said corporation to be organized by them as aforesaid to execute as lessee the said indenture of lease, and they, as individuals, would at the same time execute in favor of the lessor a guarantee substantially in the form of the document attached thereto.

Thereafter said Gladys Bilicke and A. B. C. Dohrmann as executors of said estate duly performed all the terms and conditions upon their part to be kept and performed to the end that on the 15th day of January, 1921, a corporation was organized under the laws of the State of California with the corporate name of Fifth and Broadway Investment Company and the stock thereof was acquired and owned by said Gladys Bilicke individually and as guardian of her three minor children.

V.

Petitioner alleges that on the 2nd day of November, 1920, said W. A. Faris and R. M. Walker made a gift of said contract to [15] said C. J. Milliron by giving and assigning, in writing, to said C. J. Milliron all their right, title and interest in and to said agreement.

VI.

Petitioner further alleges that thereafter and on the 30th day of March, 1921, said C. J. Milliron caused to be organized under the laws of the State of California aforesaid, Fifth Street Building, a corporation, having an authorized capital stock of \$1,500,000.00, divided into 15,000 shares of the par value of \$100.00 each.

VII.

Petitioner alleges thereafter and on the 18th day of May, 1921, said Fifth Street Building, a corporation, entered into an agreement with said C. J. Milliron whereby said C. J. Milliron agreed to sell and assign to said last named corporation all his right, title and interest in and to said agreement for a lease for a consideration of \$640,000.00, and, in payment thereof, said Fifth Street Building agreed to issue and deliver to said C. J. Milliron 6,400 shares of the capital stock of said corporation of the aggregate par value of \$640,000.00. Thereupon and on the 18th day of May, 1921, said C. J. Milliron and Edith Milliron, his wife, assigned all their right, title and interest in and to said agreement for a lease to said Fifth Street Building, a corporation.

VIII.

Thereafter and on the 20th day of May, 1921, pursuant [16] to votes and authorization of their respective boards of directors first had and obtained, said Fifth and Broadway Investment Company, as lessor, and said Fifth Street Building, as lessee, executed said lease provided for in said agreement for a lease, wherein and whereby the said lessor leased to said lessee the premises particularly described in paragraph IV of this amended petition for and during the term of ninety-nine years beginning on the 1st day of January, 1921, and ending on the 31st day of December, 2019, at the rentals therein provided and upon the terms, conditions and

covenants therein set forth. That said lease is in full force and effect, and petitioner has been at all times since its execution, and is, the owner thereof.

IX.

Thereafter and on the 3rd day of June, 1921, the Commissioner of Corporations of the State of California, having issued his permit authorizing the issuance of said 6,400 shares of the capital stock of said Fifth Street Building to C. J. Milliron in pursuance of aforesaid agreement said Fifth Street Building issued and delivered to said C. J. Milliron 6,400 shares of its capital stock. That immediately upon said issuance of said 6,400 shares the outstanding and issued capital stock of said Fifth Street Building was (including said 6,400 shares) 6,403 shares; and ever since the 10th day of February, 1922, the issued and outstanding shares of capital stock of said Fifth Street Building has been, and is, 6,713 shares. [17]

X.

By the Revenue Act of 1918, approved February 4, 1919, (40 Stat. L. 1057) it is provided in Sec. 202 thereof as follows:

(a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

XI.

By the Revenue Act of 1921, approved November 23, 1921, (42 Stat. L. 227), it is provided in Sec. 202 thereof:

(a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property, except that—

(1) In the case of such property, which should be included in the inventory, the basis shall be the last inventory value thereof;

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, [18] according to the best information the Commissioner is able to obtain, such prop-

erty was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

XII.

By the Revenue Act of 1921, approved November 3, 1921, (42 Stat. L. 227) it is provided:

Sec. 234 (a) That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions
* * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913.

XIII.

By said Revenue Act of 1921, it is provided as follows:

Sec. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 19 per centum of the amount of the net income in excess of the

credits provided in section 236; and

(b) For each calendar year thereafter 12½ per centum of such excess amount. [19]

XIV.

By the provision of Sec. 236 of said Revenue Act of 1921, it is, among other things, provided as follows:

Sec. 236. That for the purpose only of the tax imposed by section 230 there shall be allowed the following credits:

(c) The amount of any war-profits and excess-profits taxes imposed by act of Congress for the same taxable year.

Sec. 301. That in lieu of the tax imposed by Title III of the Revenue Act of 1918, but in addition to the other taxes imposed by this act, there shall be levied, collected and paid for the calendar year 1921 upon the net income of every corporation (except corporations taxable under subdivision (b) of this section) a tax equal to the sum of the following:

FIRST BRACKET

Twenty per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

SECOND BRACKET

Forty per centum of the amount of the net income in excess of 20 per centum of the invested capital.

XV.

The excess profits credit mentioned in said section 301 of said Revenue Act of 1921, is provided for by section 312 of said Act, and the portion of said section 312 which is material to this controversy, is as follows:

Sec. 312. That the excess profits credit shall consist of a specific exemption of \$3,000.00 plus an amount equal to 8 per centum of the invested capital for the taxable year. [20]

XVI.

The term "invested capital" for the purposes of said Revenue Act of 1921 is defined in section 326 thereof, and the portion of which is material to this controversy is as follows:

Sec. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section) (1) Actual cash bona fide paid in for stock or shares. (2) Actual cash value of tangible property other than cash, bona fide paid in for stock or shares at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus.

That subdivision (b) and (c) of said Section 326 are not material to this controversy.

XVII.

By section 331 of said Revenue Act of 1921, it is provided as follows:

Sec. 331. That in the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: Provided, That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when [21] acquired by such previous owner) with proper allowance for depreciation, impairment, betterment or development, but no addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after March 1, 1913, in computing the net income of such previous owner for purposes of taxation.

XVIII.

Petitioner further alleges pursuant to the provisions of law that it made return of its annual net income for the year 1921, and thereupon an income and excess profits tax was assessed against petitioner in the sum of \$16,361.81, all of which tax the petitioner paid to the Collector of Internal Revenue of the United States for the Sixth Collection District of California, after the first day of March, 1922, and during said year, as set forth in paragraph I of this amended petition; but as a matter of law and fact, there was lawfully assessable against petitioner only the sum of \$15,149.22 and petitioner alleges that no part of the sum of \$1,212.59 was due, owing or payable by the petitioner, said last named amount being the difference between the amount actually due and lawfully assessable and the sum wrongfully assessed and paid as aforesaid.

XIX.

Thereafter respondent caused to be made a re-examination of said tax for the year 1921, and on the 19th day of April, 1926, respondent determined there was a deficiency in tax of \$19,684.69, in respect of income and the excess profits tax imposed by law; and thereupon and on said 19th day of April, 1926, said respondent sent notice of said deficiency to said petitioner [22] by registered mail, copy of which said notice of deficiency is hereto attached marked Exhibit "A" and made a part of this amended petition, all of which is also set forth in paragraph I of this amended petition.

XX.

Petitioner was incorporated for the purpose of acquiring aforesaid contract for a lease and said contract was purchased by petitioner for the sum of \$640,000.00 and paid for in stock of the corporation of the par value of \$640,000.00, all as above set forth. That the value of said contract for a lease on the 2nd day of November, 1920, was the sum of \$640,000.00, and, further, the value of said leasehold interest on the 30th day of March, 1921, and also on the 18th day of May, 1921, was at least said sum of \$640,000.00; that from and after March 30, 1921, said leasehold interest was part of the invested capital of said petitioner during said year 1921, i. e. for a period of 276 days, and said sum of \$640,000.00, prorated over a period of 276 days is the sum of \$483,945.20. That petitioner was entitled to include as a part of its invested capital for said year 1921, said sum of \$483,945.20, in addition to the sum of \$8,904.66 allowed and determined by the respondent as the invested capital of the petitioner during the year 1921, but respondent erroneously and contrary to law neglected and refused to include as a part of the invested capital of petitioner in determining its income and excess profits tax liability for the year 1921, said sum of \$483,945.20; that petitioner alleges that its invested capital for the year 1921 which it was entitled to use and include in its [23] income tax return in determining its income and excess profits tax of said year 1921 was \$492,849.86, and not the sum of \$8,904.66 as determined by the respondent.

XXI.

Petitioner alleges that it was and is entitled to deduct from its gross income for the year 1921 a reasonable allowance for exhaustion of aforesaid lease and that 1/99 of the value of said lease for said term of 99 years, or the sum of \$6,464.64, being 1/99 of \$640,000.00, the value of said lease as aforesaid, is a reasonable allowance for exhaustion of said lease. Petitioner further alleges that respondent erroneously and contrary to law refused to allow and neglected to include in his determination of the tax liability of petitioner for the year 1921 as a deduction from its gross income said sum of \$6,464.64 as exhaustion of aforesaid lease for said year 1921.

XXI.(A).

Petitioner alleges that its gross income for the year 1921 was the sum of One Hundred Fifty-two Thousand Two Hundred Thirty and 67/100ths (\$152,230.67) Dollars, and that the total deductions allowed by law in determining its net income, without including said sum of \$6,464.64 on account of the exhaustion or amortization of said leasehold as above set forth, is the sum of Sixty-four Thousand Eight Hundred Sixty-eight and 71/100ths (\$64,868.71) Dollars, and that the net income, without the benefit of said deduction of \$6,464.64 as amortization aforesaid, is the sum of Eighty-seven Thousand Three Hundred Sixty-one and [24] 96/100ths (\$87,361.96) Dollars, and that the true net income, after deducting said sum of \$6,464.64, exhaustion of said leasehold, as hereinbefore set forth, is the sum

of Eighty Thousand Eight Hundred Ninety-seven and 32/100ths (\$80,897.32) Dollars.

XXII.

Petitioner alleges that by reason of the facts hereinbefore set forth the true net income of the petitioner for the year 1921 is the sum of \$80,897.32 and not the sum of \$87,361.96; that the invested capital of the petitioner for said year 1921 is the sum of \$492,849.86, and not the sum of \$8,904.66, and that the amount of income and excess profits taxes due from the petitioner for said year 1921 is the sum of \$15,149.22, and not the sum of \$36,046.50. That the erroneous determination of tax by the respondent arises as follows:

(a) In determining the net income of the petitioner for the year 1921 respondent neglected and refused to deduct from the gross income of the petitioner the sum of \$6,464.64, being exhaustion of the aforesaid lease for the year 1921;

(b) In determining the invested capital of the Petitioner for said year 1921, respondent neglected and refused to allow as a part of said invested capital the sum of \$483,945.20, being the pro rata amount of the value of aforesaid lease, to-wit, \$640,000.00.

Petitioner further alleges that it has paid on account of income and excess profits taxes for the year 1921 the sum of \$16,361.81, and by reason of the foregoing facts it has overpaid the amount of its income and excess profits taxes for said year [25] 1921 in the sum of \$1,212.59.

WHEREFORE, the petitioner prays:

1. That this Board redetermine said alleged deficiency, and upon said redetermination it be held

that there is no deficiency due from petitioner as determined by respondent;

2. That it be determined by this Board that petitioner has paid the sum of One Thousand Two Hundred Twelve and 59/100ths (\$1,212.59) Dollars in excess of the amount due from the petitioner upon account of its income and excess profits taxes for the year 1921, and that there has been an overassessment in said amount;

3. And for such other and further relief as may be proper.

FIFTH STREET BUILDING.

By C. J. MILLIRON, President.

Fifth Street Building, 518 Merchants Natl. Bank Bldg., Los Angeles, California.

Attest:

C. J. DUGGAN, Secretary.

C. J. MILLIRON,

518 Merchants National Bank Bldg., Los Angeles, California.

EDW. S. BRASHEARS,

710 Fourteenth Street, N. W., Washington, D. C.

Attorneys for Petitioner. [26]

State of California

County of Los Angeles—ss.

C. J. MILLIRON, being first duly sworn, deposes and says: that he is the President of the petitioner corporation named in the foregoing amended petition; that he has read said amended petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information or belief, and as to those

matters he believes them to be true; that he makes this verification on behalf of the within named petitioner; that the aforesaid proceedings are not instituted merely for delay and said proceedings are not frivolous.

C. J. MILLIRON.

Subscribed and sworn to before me this 21st day of January, 1927.

[Seal] LEO M. DALY,
Notary Public in and for the County of Los Angeles,
State of California. My Commission Expires
June 18, 1930. [27]

EXHIBIT "A"

(1639M)

Form NP-2

SEAL

TREASURY DEPARTMENT

Office of Commissioner
of Internal Revenue.

Washington

April 19, 1926.

IT:CA:PYA-5-2-60D

Fifth Street Building,
518 Merchants Bank Building,
Los Angeles, California.

Sirs:

The determination of your income tax liability for the year 1921, pursuant to an examination of your books of account and records, as set forth in office letter dated February 17, 1926, and after consideration of your protest dated March 13, 1926, and as result of a conference dated January 7, 1926, disclosed a deficiency in tax amounting to \$19,684.69 as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days

from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:PYA-5-2-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

(Signed)

By C. R. NASH,
Assistant to the Commissioner.

Enclosures: Statement Waiver—Form A. Form 882. [28]

STATEMENT

IT:CA:PYA-5-2-60D

In re: Fifth Street Building,
518 Merchants Bank Building,
Los Angeles, California.

Year	Deficiency in Tax.
1921	1921 \$19,684.69.
Net income reported	\$85,170.97
Add:	
Accrued recoverable rents	2,060.49
Organization expenses	1,130.50
	<hr/>
Total	\$88,361.96
Deduct:	
Return of capital	1,000.00
	<hr/>
Net income as adjusted	\$87,361.96

The above adjustments are explained in detail in Schedules I-a and I-b, of Revenue Agent's report, dated November 24, 1925, a copy of which has been furnished you.

The adjustment made by the examining officer allowing amortization of ground rent in the amount of \$2,000.00 has been eliminated for the reason that no value has been established on the agreement for a lease, which was paid in for stock, since such agreement had no value and was not enforceable in the hands of anyone but the original parties thereto.

Invested Capital

Invested capital reported	\$491,740.26
Add:	
Stock sold May 12, 1921	.01
“ “ June 3, 1921	1,109.59
	<hr/>
Total	\$492,849.86
Deduct:	
Stock issued for lease	483,945.20
	<hr/>
Invested capital as adjusted	\$ 8,904.66

The additions for stock sold for cash during the taxable year shown in Schedule H. of your return have been adjusted to conform with Article 853, Regulations 62. [29]

The elimination from invested capital of \$483,945.20 shown in Schedule H. of your return as the prorated amount of stock issued for lease is in accordance with Section 331 of the Revenue Act of 1921 which provides that for invested capital purposes such an asset may be included only at its cost to the prior owner, which in this case was nothing.

Excess Profits Tax Under
Section 302.

Income	Credit	Balance	Rate	Tax
\$20,000.00	\$3,000.00	\$17,000.00	20%	\$ 3,400.00
67,361.96		67,361.96	40%	26,944.78
<hr/>	<hr/>	<hr/>		<hr/>
\$87,361.96	\$3,000.00	\$84,361.96		\$30,344.78

Net income	\$87,361.96
Less:	
Profits tax	30,344.78
	<hr/>
Taxable at 10%	57,017.18
Tax at 10%	5,701.72
	<hr/>
Total tax assessable	\$36,046.50
Original tax	16,361.81
	<hr/>
Deficiency in tax	\$19,684.69

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[Endorsed]: U. S. Board of Tax Appeals. Filed at Hearing Feb. 15, 1927. [30]

[Title of Court and Cause.]

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for an amended answer to the petition heretofore filed by the above-named petitioner, admits and denies as follows:

I. Admits the allegations of paragraph numbered I.

III. Admits the allegations of paragraph numbered III.

IV. For lack of information upon which to base

a belief he denies the allegations of paragraph IV of said petition, except that he admits that on November 1, 1920, Gladys Bilicke and A. B. C. Dohrman were executors of the last will and testament of A. B. Bilicke, and that decedent's estate owned real property described in paragraph IV of said petition.

V. Denies the allegations of paragraph numbered V.

VI. Admits the allegations of paragraph numbered VI.

VII. For lack of information upon which to base a belief, he denies the allegations of paragraph VII. [31]

VIII. For lack of information upon which to base a belief, he denies the allegations of paragraph VIII.

IX. For lack of information upon which to base a belief, he denies the allegations of paragraph IX.

X. Neither admits nor denies the allegations of paragraph X.

XI. Neither admits nor denies the allegations of paragraph XI.

XII. Neither admits nor denies the allegations of paragraph XII.

XIII. Neither admits nor denies the allegations of paragraph XIII.

XIV. Neither admits nor denies the allegations of paragraph XIV.

XV. Neither admits nor denies the allegations of paragraph XV.

XVI. Neither admits nor denies the allegations of paragraph XVI.

XVII. Neither admits nor denies the allegations of paragraph XVII.

XVIII. Answering the allegations of paragraph XVIII, he admits that the tax heretofore assessed for the year 1921 amounted to \$16,361.81 and that said amount has been paid. Denies the remaining allegations of paragraph XVIII.

XIX. Admits the allegations of paragraph numbered XIX.

XX. Answering the allegations of paragraph XX, he denies that the lease was worth on November 2, 1920, or on March 30, 1921, or on May 18, 1921, \$640,000 or any amount whatsoever.

XXI. Answering the allegations of paragraph XXI, he admits that the respondent has refused to permit the deduction of \$6,464.64 from gross income of the petitioner for the year 1921 on account of the alleged [32] exhaustion of said lease and denies that said lease had any value whatsoever.

XXII. Denies the allegations of paragraph numbered XXII.

Denies generally and specifically each and every allegation not hereinbefore admitted, qualified or denied.

WHEREFORE it is prayed that said petition be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN D. FOLEY,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 19, 1926. United States Board of Tax Appeals. [33]

[Title of Court and Cause.]

AMENDMENTS TO AMENDED ANSWER.

(Read into Record May 26, 1930.)

“The respondent admits that the net income for the year 1921, on which the Respondent determined a deficiency for the said year 1921 was \$87,361.96.

“Admits that the Respondent in determining the taxable income for the year 1921 as \$87,361.96 did not allow an amount of \$6,464.64, or any other amount on account of depreciation on an alleged leasehold.

“Admits that should the Board find that the taxpayer is entitled to a deduction from its income for the year 1921 on account of depreciation of an alleged leasehold, that the amount so determined by the Board should be deducted from the aforesaid net income of \$87,361.96.” [34]

[Title of Court and Cause.]

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency (IT:AR:C-7:MLB-60D) dated July 10, 1929, and as a basis for its proceeding alleges as follows:

I.

Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City of Los Angeles, County of Los Angeles, State of California, and within the 6th Collection District of California; that on or about the 15th day of March, 1927, and within the time allowed by law, petitioner filed its income tax return for the year 1926 with the Collector [35] of Internal Revenue of said 6th Collection District of California and said return so filed by said petitioner showed a net income of \$24,600.05 and a tax was determined thereon in the amount of \$3,051.01; that thereafter and within the time allowed by law the petitioner fully paid said tax, that thereafter and on the 10th day of July, 1929, respondent redetermined that there was a deficiency in tax for the year 1926 of \$1,142.72 in respect of income taxes imposed by law, and thereupon and on said 10th day of July, 1929, said respondent sent a notice of said deficiency to said petitioner by registered mail, a copy of which said notice of deficiency is hereto attached marked "Exhibit A", and made a part of this petition; that the sixty days have not elapsed since the 10th day of July, 1929, and the petitioner files this petition with the Board of Tax Appeals for re-determination of aforesaid alleged deficiency.

II.

Notice of deficiency (copy of which is hereto attached marked "Exhibit A") was mailed to petitioner on July 10, 1929.

III.

The taxes in controversy are income taxes for the year 1926 in the sum of \$1,142.72.

IV.

The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) That the respondent erred in determining that there was any deficiency in tax in the sum of \$1,142.72 or in any other amount or at all due from petitioner upon account of income taxes [36] for the year 1926.

(b) Respondent erred in determining and holding that the net income of petitioner for the year 1926 was \$31,064.70, or any sum in excess of \$24,600.05.

(c) Respondent erred in holding and determining that petitioner was not entitled to deduct the sum of \$6464.65 as obsolescence, depreciation or exhaustion of the value of the leasehold (referred to by the respondent as "lease amortization") and in not holding that this amount should have been included as a deduction in determining the net income of petitioner for said year.

(d) Respondent erred in holding and determining that the value of the said lease to the petitioner was nothing and in not holding that the cost to petitioner of said lease or contract to execute a lease

was the sum of \$640,000.00 and that the value of said contract to execute a lease was the sum of \$640,000.00 at the time of purchase by petitioner.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) That at all times herein mentioned the petitioner was and now is a corporation organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California. [37]

(b) That on the 18th day of May, 1921, petitioner entered into an agreement with C. J. Milliron whereby said C. J. Milliron agreed to sell and assign to petitioner all of his right, title and interest in and to a certain agreement for a lease for a consideration of \$640,000.00, and in payment thereof petitioner agreed to issue and deliver to said C. J. Milliron 6,400 shares of the capital stock of petitioner of the aggregate par value of \$640,000.00. That on the 18th day of May, 1921, said C. J. Milliron and Edith Milliron, his wife, in accordance with aforesaid agreement, assigned all their right, title and interest in and to said agreement for a lease to the petitioner; that said agreement for a lease covered the real property substantially described as follows:

That portion of Lot Four (4) in Block Fourteen (14) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 53, page

66, et seq., Miscellaneous Records of said County, described as follows:

Beginning at the North East corner of said lot; thence southerly along the westerly line of Broadway forty-eight (48) feet; thence at right angles westerly one hundred fifty-five (155) feet to an alley; thence at right angles northerly along said alley forty-eight (48) feet to the north line of said lot; thence at right angles easterly one hundred fifty-five (155) feet to the point of beginning.

Part of Lot Five (5) in Block Fourteen (14) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to-wit:

Beginning at the point of intersection of the Easterly line of said Lot with the center line, produced Easterly of the party wall described in the [38] agreement between Aaron M. Ozman and William H. Perry, dated February 5, 1896, and recorded in the Recorder's Office of said County, in Book 1063 of Deeds, page 133, said point being sixty (60) feet, a little more or less, Southerly from the intersection of said Easterly line with the Southerly line of Fifth Street; thence running Westerly along said produced center line and along the center line of said wall, one hundred twenty-two (122) feet and four (4) inches, more or less, to the intersection of said center line with the center line of the party wall described in the agreement aforesaid, which runs Southerly from Fifth Street; thence Northerly along said center line sixty (60) feet,

more or less, to the Southerly line of Fifth Street at a point one hundred twenty-two (122) feet and four (4) inches Westerly from its intersection with the Westerly line of Broadway as originally established; thence Westerly along said line of Fifth Street forty-two (42) feet and eight (8) inches, more or less, to the Easterly line of the alley running Northerly and Southerly through said block; thence Southerly along the Easterly line of said alley sixty (60) feet, more or less, to an angle in said line; thence continuing along said line of alley South twenty-eight (28) degrees (28°), thirty-six and one-half minutes ($36\frac{1}{2}'$) West sixty and thirty-nine hundredths ($60\frac{39}{100}$) feet, more or less, to the Southerly line of Lot Five (5) herein recited; thence along said Southerly line, Easterly one hundred fifty-five (155) feet, more or less, to the Southeast corner of said Lot Five (5); thence Northerly along the Easterly line of the same sixty (60) feet, more or less, to the point of beginning.

Subject, however, to all existing party wall agreements and party wall rights, if any, and also to an agreement not to use the east five (5) feet of the portion of all premises fronting on Broadway for any permanent improvement.

(c) That thereafter and on the 20th day of May, 1921, pursuant to votes and authorization of their respective boards of directors first had and obtained, petitioner and Fifth & Broadway Investment Company, a corporation, entered into the lease in ac-

cordance with the terms of the said agreement to make a lease above mentioned. [39]

(d) That thereafter and on the 3rd day of June, 1921, the Commissioner of Corporations of the State of California, having issued his permit authorizing the issuance of said 6,400 shares of the capital stock of the petitioner to said C. J. Milliron in payment for aforesaid agreement to make a lease, petitioner issued to said C. J. Milliron 6,400 shares of its capital stock in payment for said agreement.

(e) Petitioner further alleges that on the 18th day of May, 1921, at the time of the sale of said agreement to make a lease to petitioner, and on the 3rd day of June, 1921, said agreement was of the reasonable value of at least \$640,000.00.

(f) Petitioner alleges that its gross income for the year 1926 was the sum of \$358,227.73, and that the total deductions allowed by law in determining its net income without deducting the amount of \$6464.65 on account of amortization, exhaustion or obsolescence of said leasehold as above mentioned, was \$327,163.03, and that the total deductions including the said amortization, exhaustion or obsolescence of said leasehold amounting to \$6464.65, was \$333,627.68, and that the net income of petitioner for said year was the sum of \$24,600.05.

(g) That said leasehold was for a term of 99 years from January 1, 1921, to December 31, 2019, and that the reasonable depreciation, exhaustion, obsolescence or amortization of said leasehold for each of the several years of its term is the sum of \$6464.65, and that the same is a reasonable allowance for obsolescence, exhaustion, depreciation or

amortization of said leasehold for the year 1926, and that the same was actually sustained during said year. [40]

VI.

Petitioner alleges that by reason of the facts hereinbefore set forth, the true net income of petitioner for the year 1926 is the sum of \$24,600.05 and not \$31,064.70, and that the amount of income taxes due from petitioner for the said year 1926 is \$3,051.01, all of which said amount has been duly paid according to law, and not \$4,193.73 as determined by the respondent.

WHEREFORE, petitioner prays that this Board may hear the proceeding and redetermine said alleged deficiency, and upon said redetermination that it be held that there is no deficiency due from petitioner for the year 1926, and for such other and further relief as the Board may deem proper in the premises.

C. J. MILLIRON,

Counsel for Petitioner.

518 Fidelity Building, Los Angeles, California.

EDW. S. BRASHEARS,

Counsel for Petitioner.

910 Seventeenth Street, N. W., Washington, D. C.

[41]

State of California

County of Los Angeles—ss.

C. J. MILLIRON, being duly sworn, says: That he is the President of the petitioner corporation above named and that he is duly authorized to verify the foregoing petition; that he has read the fore-

going petition and is familiar with the statements contained therein, and that the facts stated are true except as to those facts stated to be upon information and belief, and those facts he believes to be true.

C. J. MILLIRON

Subscribed and sworn to before me this 19th day of August, 1929.

[Seal]

URBAN M. DERKUM

Notary Public in and for the County of Los Angeles, State of California. My Commission Expires March 1, 1932. [42]

“EXHIBIT A”

Form NP-2

SEAL TREASURY DEPARTMENT

Office of

Commissioner of Washington

Internal Revenue

July 10, 1929

Fifth Street Building,
518 Merchants National Bank Building,
Los Angeles, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of \$1,142.72, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the six-

tieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully

ROB'T H. LUCAS,

Commissioner.

By C. B. ALLEN

Deputy Commissioner.

Inclosures:

Statement

Form 866

Form 882

Form 7928-Rev. Dec., 1928. [43]

STATEMENT

IT:AR:C-7

MLB-60D

In re: Fifth Street Building,
518 Merchants National Bank Building,
Los Angeles, California.

Tax Liability

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1926	\$4,193.73	\$3,051.01	\$1,142.72

Reference is made to the report of the Internal Revenue Agent in Charge, San Francisco, California, and to your protest executed under date of August 15, 1928.

Careful consideration has been accorded your protest in connection with the agent's findings. The adjustments recommended by the agent have been approved by this office.

Inasmuch as the point protest, "amortization of leasehold," is the same issue protested in prior years and now pending action before the United States Board of Tax appeals, your tax liability has been determined in accordance with Section 274 of the Revenue Act of 1926.

Net income reported on return	\$24,600.05
Addition:	
Amortization of leasehold	6,464.65
	<hr/>
Net income as adjusted	\$31,064.70

Explanation of Change

Amortization of leasehold has been disallowed in total since the matter of the correct valuation to be placed upon the leasehold for the purpose of amortization is now pending hearing before the United States Board of Tax Appeals. Since no value was allowed on the leasehold in prior years, the same action is taken in this year. Reference: Article 110, Regulations 69.

Computation of Tax

Net income as adjusted subject to	
tax at 13½%	\$31,064.70
Income Tax at 13½%	4,193.73
Tax previously assessed	3,051.01
	<hr/>
Deficiency in tax	\$1,142.72

[Endorsed]: Filed Aug. 26, 1929. U. S. Board of Tax Appeals. [44]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above named taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition except the allegation that "thereafter and within the time allowed by law the petitioner fully paid the said tax", which is denied for want of information sufficient to form a belief in respect of same.

II. Admits the allegation contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition.

IV. Denies that the Commissioner erred in respect of the matters set forth in subparagraphs (a), (b), (c) and (d) of paragraph IV of the petition.

V. (a) Admits the allegations contained in subparagraph (a) of paragraph V of the petition.

(b), (c), (d), (e), (f) and (g). Denies the allegations contained in subparagraphs (b), (c), (d), (e), (f) and (g) of paragraph V of the petition. [45]

VI. Denies the allegations contained in paragraph VI of the petition.

VII. Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

BYRON M. COON, Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 8, 1929. [46]

[Title of Court and Cause.]

AMENDMENTS TO ANSWER

(Read into Record May 26, 1930.)

“In the case of Docket 45537, paragraph 5-(f) the Respondent admits that the net income for the year 1926 on which the Respondent determined a deficiency for the said year 1926 was \$31,064.70.

“Admits that the Respondent in determining the taxable income for the year 1926 as \$31,064.70 did not allow an amount of \$6,464.65 or any other amount on account of depreciation on alleged leasehold. Ad-

mits that should the Board find that the taxpayer is entitled to a deduction from its income for 1926 on account of depreciation of an alleged leasehold, that the amount so determined by the Board should be deducted from the aforesaid income of \$31,064.70.

“Now, as to the year 1926, covered by Docket 45537, the Respondent admits that the Petitioner paid \$3,051.01 in tax on the original return.” [47]

[Title of Court and Cause.]

FINDINGS OF FACT AND OPINION.

Value of lease acquired May 18, 1921 cannot be included in invested capital under section 331 of the Revenue Act of 1921, where prior owner acquired same without cost and received and retained all but three of the shares of capital stock of petitioner in payment thereof.

Value of lease determined for purpose of exhaustion thereof for years 1921 and 1923.

No deduction for exhaustion of lease allowable for the year 1926 under Revenue Act of 1926 where cost of lease to transferor was nothing.

Clark J. Milliron, Esq., and Charles E. Watkinson, Esq., for the petitioner.

M. B. Leming, Esq., for the respondent.

These are proceedings duly consolidated for hearing and opinion for the redetermination of deficiencies in income and profits taxes as follows:

Docket No.	Kind of Tax	Year	Deficiency
16627	Income and Profits	1921	\$19,684.69
29264	Income	1923	1,058.08
45537	Income	1926	1,142.72

In Docket No. 16627, it is alleged that the respondent erred in:

(1) Failing to hold that the petitioner by inadvertence and mistake erroneously reported its net income for the year 1921 as \$85,170.97 instead of \$80,-897.32, and in holding the net income to be \$87,-361.96; [48]

(2) Refusing to allow petitioner, for the year 1921, a deduction in the amount of \$6,464.64 on account of the exhaustion of a lease;

(3) Eliminating from petitioner's claimed invested capital for the year 1921 the sum of \$483,-945.20 on account of stock issued to C. J. Milliron in payment of a certain agreement for a lease dated November 1, 1920, entered into by and between Gladys Bilicke and A. B. C. Dohrmann as first parties and W. A. Faris and R. M. Walker as second parties, which agreement had previously been transferred on November 2, 1920, without consideration, by said W. A. Faris and R. M. Walker to C. J. Milliron, and holding that petitioner's invested capital was \$8,904.66 instead of \$492,849.86;

(4) Holding that section 331 of the Revenue Act of 1921 has any application to petitioner's case; and

(5) Failing to determine that there has been an overassessment and overpayment of \$1,212.59 of income and excess profits taxes of petitioner for the year 1921.

Under each of Dockets Nos. 29264 and 45537, relating to the years 1923 and 1926, respectively, it is alleged that the respondent erred in refusing to allow the petitioner a deduction in the amount of \$6,464.65 on account of obsolescence, depreciation or exhaustion of a leasehold.

These proceedings were submitted on the pleadings, stipulation of facts, and testimony from which we make our findings of fact as follows: [49]

FINDINGS OF FACT.

On November 1, 1920, an agreement was entered into between Gladys Bilicke and A. B. C. Dohrmann, first parties, and W. A. Faris and R. M. Walker, second parties, in which the first parties, as executors of the Estate of A. C. Bilicke, deceased, agreed to cause to be executed a lease of certain real property in Los Angeles, California, the same being a portion of Lots 4 and 5 in Block 14 of the Ord Survey, as follows:

AGREEMENT, made as of this 1st day of November, 1920, by and between GLADYS BILICKE and A. B. C. DOHRMANN, as first parties, and W. A. FARIS AND R. M. WALKER, as second parties.

The first parties represent that they are the Executors of the Last Will and Testament of A. C. Bilicke, deceased, and that said estate owns real property in the City of Los Angeles, State of California, substantially described as follows:

[Description omitted]

1. The first parties agree that they will forthwith cause a corporation to be organized under

the laws of the State of California, having some suitable name, and that they will immediately institute and take such proceedings as may be permitted by law to cause the real property to be distributed pursuant to the said Will and to be acquired by said corporation, or by said corporation and said Gladys Bilicke, to the end that Gladys Bilicke, one of the said first parties, individually, and as the guardian of her three minor children, shall own all of the issued stock of said corporation, and that said corporation, or said corporation and said Gladys Bilicke, may make a valid lease of said real property for the term of ninety-nine years. Said first parties agree that they will use every endeavor to promptly accomplish the above and foregoing results.

2. The second parties agree that they will cause a corporation to be organized under the laws of the State of California having some suitable name, for the purpose of leasing the said real property for a term of ninety-nine (99) years commencing January 1, 1921. And the first parties agree that when the said real property shall be acquired by the corporation to be organized by them in accordance with the provisions of this agreement, they will cause said corporation or said corporation and said [50] Gladys Bilicke, to execute, as Lessor, an indenture of lease substantially in the form of the document attached hereto and marked "A". The second parties agree that they will thereupon

cause the said corporation to be organized by them, as aforesaid, to execute, as lessee, the said indenture of lease, and that they, as individuals, will at the same time execute in favor of the lessor a guaranty substantially in the form of the document attached hereto and marked "B". It is agreed between the parties that at the time of the execution of the indenture of lease marked "A", there shall also be executed by the parties thereto a supplemental agreement substantially in the form of the document attached hereto marked "C".

* * * * *

The proposed lease provided, among other things, that the lessee should pay a yearly rental of \$50,000, throughout the term of the lease, should pay all taxes, etc., should erect at its own cost a modern steel frame or reinforced concrete fireproof store and loft building, having a basement and at least eight stories, such building to cover at least the area covered by the old buildings then on the premises. It also provided that the lessee should have the right to encumber, hypothecate or assign the leasehold interest, subject to the rights of the lessor. It further provided that in the event of default by the lessee for a period of 90 days of any of its obligations under the lease the lessor should have the right to terminate the lease.

Below and following the signatures of Gladys Bilicke and A. B. C. Dohrmann, W. A. Faris and R. M. Walker, on the agreement for lease, the following appears:

November 1, 1920

It is further agreed that in consideration of the cancellation as of December 31, 1920, of the present lease held by the second parties on the above described property, the second parties will [51] pay to the first parties Thirty Thousand Dollars (\$30,000) on December 31, 1920, and in the event of a failure to execute the proposed lease annexed hereto and marked "A", the said Thirty Thousand Dollars (\$30,000) shall be returned to the second parties with interest at the rate of six per centum (6%) per annum, in which said event said present lease shall remain in full force and effect.

Gladys Bilicke

A. B. C. Dohrmann

W. A. Faris

R. M. Walker

Prior to November 1, 1920, three leases, all dated December 27, 1911, together covering the same property described in the contract for lease of November 1, 1920, had been executed by A. C. Bilicke and Muse, Faris & Walker Company, a corporation. These leases provided for an aggregate rental of \$96,000 and the term of each lease expired October 31, 1922. On December 22, 1916, these leases were assigned by Muse, Faris & Walker Company, a corporation, to R. M. Walker and W. A. Faris, doing business under the firm name of Faris-Walker, The 5th Street Store.

November 2, 1920, the following letter was signed by Faris and Walker and delivered to C. J. Milliron:

In consideration of your assuming all of the duties and obligations imposed upon us by reason of our contract to execute a lease dated November 1st, 1920, between Gladys Billicke and A. B. C. Dohrman and ourselves as second parties, a copy of which agreement is attached, we hereby give and assign to you all our right, title and interest in said agreement, it being understood that you are to assume all of our obligations either directly or indirectly imposed as a result of this agreement.

On the same date the following letter was signed by C. J. Milliron and delivered to W. A. Faris and R. M. Walker: [52]

Your gift to me today of your contract of November 1st to execute a lease on the premises generally known as the "Billicke" properties, is hereby accepted and I agree to assume all your obligations thereunder and to hold you free and clear of any liabilities as a result thereof.

I will cause to be prepared an assignment of this contract executed in due form for the purpose of record.

(Only the bodies of the foregoing letters are set forth)

On November 1, 1920, Faris and Walker paid \$30,000 to the Estate of A. C. Bilicke, deceased, and received a receipt therefor as follows:

Received from Faris-Walker, a partnership composed of W. A. Faris and R. M. Walker, the sum of thirty thousand dollars (\$30,000) as

a bonus for the cancellation of three certain leases dated December 27, 1911, between A. C. Billicke, lessor, and Meuse, Faris Walker Company, a corporation, as lessee, under which said leases Faris-Walker now occupy the premises described therein facing on Broadway and Fifth Street, in the city of Los Angeles, California, which said payment is received on account of cancellation of said lease, in accordance with the agreement entered into November 1, 1920, between Gladys Billicke and A. B. C. Dohrman, as executors of the will of Albert C. Billicke, deceased, and W. A. Faris and R. M. Walker.

Dated Los Angeles, California, this 31st day of December, 1920.

Signed "Estate of Albert C. Billicke, deceased, by Arthur C. Hurt, Attorney for the Executors."

On January 2, 1921, Clark J. Milliron, as first party, and W. A. Faris and R. M. Walker, co-partners, doing business under the firm name and style of Fifth Street Store, as second parties, executed a lease wherein and whereby the premises described in the agreement for [53] lease of November 1, 1920, were leased to Faris and Walker from January 1, 1921, to December 31, 1921, and for such longer time thereafter as the parties shall agree at a rental of \$150,000 payable in twelve equal installments of \$12,500. It further provided that Faris and Walker were to pay in addition to the rental, all taxes and keep the premises fully insured.

January 15, 1921, a corporation was organized

under the laws of the State of California, with a corporate name of Fifth and Broadway Investment Company and the stock thereof was acquired and owned by Gladys Billicke, individually, and as guardian of her three minor children.

. On March 30, 1921, C. J. Milliron caused to be organized under the laws of the State of California, a corporation known as Fifth Street Building with an authorized capital stock of \$1,500,000, divided into 15,000 shares of the par value of \$100 each. This corporation is the petitioner in this proceeding.

Minutes of special meeting of stockholders of petitioner held May 18, 1921, contain the following resolution:

(Preamble setting forth the history of the transaction up to that time omitted).

RESOLVED: That the Board of Directors of Fifth Street Building, is hereby authorized and directed to purchase from said Clark J. Milliron all his right, title and interest in and to said contract for lease between Gladys Billicke and A. B. C. Dohrman as lessors and W. A. Faris and R. M. Walker as lessees, for and in consideration of the sum of \$640,000, to be paid to said Clark J. Milliron in capital stock of this corporation at its par value, and as lessee to execute and enter into the aforesaid lease with Fifth & Broadway Investment Co., a corporation, as lessor. [54]

A further resolution was adopted authorizing the board of directors to execute the lease pursuant to

agreement for lease. At the time of this meeting three shares of the capital stock of petitioner had been subscribed for by Clark J. Milliron, J. D. McLeod and W. M. Pargellis, respectively.

On May 18, 1921, C. J. Milliron and wife by agreement in writing sold, transferred and set over to Fifth Street Building, the petitioner, all the right, title and interest of every kind and nature in and to the agreement for lease of November 1, 1920, and the lease to be entered into between Fifth and Broadway Investment Company, as lessor, and Fifth Street Building, as lessee, pursuant to the agreement of lease of November 1, 1920.

On May 20, 1921, an agreement of guaranty, with copy of the lease attached, was entered into between Fifth and Broadway Investment Company, as lessor, and W. A. Faris and R. M. Walker, as guarantors, providing that,

WHEREAS, it is to the benefit and advantage of the Guarantors, that said Lease should be entered into by said Lessor; and

WHEREAS, said Lessor would not enter into said Lease save for the guarantees and obligations hereinafter set forth and assumed by said Guarantors with respect to said lease;

Faris and Walker guaranteed the full and faithful performance by the lessor of each and all the terms and provisions relating to the construction of the new buildings upon the demised premises and the faithful performance by the lessor of each and every term, condition, provision and obligation contained in the lease and to be performed by the

lessor, provided, however, that all obligation of Faris and [55]Walker, as guarantors, should cease upon the full completion of and payment for the new buildings.

On May 20, 1921, following the execution of guaranty agreement, a lease in the form attached to the agreement for lease of November 1, 1921, was entered into between Fifth & Broadway Investment Company and the petitioner, Fifth Street Building, for an annual rental of \$50,000, payable in four equal installments, the lessee to pay all taxes. This lease is in full force and effect and petitioner has been at all times since its execution the owner thereof.

The lease, on January 1, 1921, and May 20, 1921, had a value of \$640,000.

On March 1, 1922, a lease was entered into covering the same premises between Fifth Street Building and Faris-Walker, a California corporation, for a term of 30 years beginning on March 1, 1922, and ending February 28, 1952, unless sooner ended in accordance with the provisions of the lease, for a net monthly rental of \$12,500 for March, April and May in 1922, and a net monthly rental of \$13.333 for each month of the remainder of the term. In addition, the lessee was required to pay the taxes paid by the lessor pursuant to terms of the ground lease and also all settlements paid by lessor to complete the building and improvements then upon the premises or thereafter to be constructed and to insure them against loss by fire as required by the terms of the ground lease, the ground lease being the lease of May 20, 1921, [56] between Fifth & Broadway In-

vestment Company and Fifth Street Building.

Clark J. Milliron, counsel for petitioner, and C. J. Milliron, to whom the letter of Faris and Walker, dated November 2, 1920, is addressed, are one and the same person. He represented Faris and Walker as counsel prior to and at the time of the execution of the agreement for lease of November 2, 1920, and until about 1924 or 1925.

Muse, Faris and Walker, later Faris and Walker, have occupied all or part of the premises described in the contract for lease since about 1906, and continued doing so even during the construction of the new building as provided for in the lease, vacating the old building and moving into parts of the new building as completed from time to time.

Ever since February 10, 1922, the total issued and outstanding shares of capital stock of petitioner has been and is 6,713 shares.

In the deficiency letter dated April 19, 1926, relating to the asserted deficiency in income and profits taxes for 1921, the Commissioner stated as follows:

* * * * *

The adjustment made by the examining officer allowing amortization of ground rent in the amount of \$2,000.00 has been eliminated for the reason that no value has been established on the agreement for a lease, which was paid in for stock, since such agreement had no value and was not [57] enforceable in the hands of anyone but the original parties thereto.

* * * * *

The elimination from invested capital of \$483,945.20 shown in Schedule H of your return

as the prorated amount of stock issued for lease is in accordance with Section 331 of the Revenue Act of 1921 which provides that for invested capital purposes such an asset may be included only at its cost to prior owner, which in this case was nothing.

The petitioner filed its income returns for the years 1921, 1923 and 1926, within the time provided by law and paid taxes thereon in the amounts of \$16,361.81, \$2,212.98 and \$3,051.01, respectively.

OPINION

McMAHON: As to the first error assigned, in the proceeding in Docket No. 16627, the respondent in his answer, as amended at the hearing, admitted that the petitioner erroneously reported its net income for the year 1921 as \$85,170.97 instead of \$80,897.32, and that the net income on which the respondent determined a deficiency for the year 1921 was \$87,361.96, having disallowed a deduction of \$6,464.64 on account of depreciation of an alleged leasehold. We, therefore, approve this correction of error.

The first question presented for consideration is whether the value, if any, of a certain agreement for lease should be included in invested capital.

The petitioner contends that the contract for lease was, in fact, a ground lease and that from and after March 30, 1921, such leasehold interest was a part of its invested capital, and having issued 6,400 shares of its stock of the par value of \$100, the invested capital should be the sum of \$640,000 prorated over the re- [58] maining 276 days of 1921, or the sum

of \$483,945.20. It is to be noted that March 30, 1921 is the date of the incorporation of the petitioner and that it was not until May 18, 1921, that the stockholders of the petitioner authorized the purchase of the agreement from Clark J. Milliron and C. J. Milliron transferred all his right and interest in and to the agreement for lease to the petitioner.

Respondent eliminated the sum of \$483,945.20 from invested capital under section 331 of the Revenue Act of 1921, which provides:

That in the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: Provided, That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) with proper allowance for depreciation, impairment, betterment or development, but no addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after

March 1, 1913, in computing the net income of such previous owner for purposes of taxation.

Clearly, since the previous owner, Clark J. Milliron, paid no consideration for the assignment to him of the agreement for lease, the cost of acquisition to him was nothing; and as Clark J. Milliron received 6,400 shares of the 6,403 shares of the stock of the petitioner outstanding in payment of the assignment of the agreement, an interest or a control of more than 50 per centum of the property [59] remained in him. In fact he was practically the sole owner at that time, there being only 2 shares held by two other stockholders. He was also the president of the petitioner and was its counsel. There is no ambiguity in the provisions: "That, if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner)." The statute applies not only to reorganization and consolidations but also to a change of ownership of a trade, business or property under conditions set forth therein. *Una Gasoline Co.*, 22 B. T. A. 45; *Simplex Engineering Co.*, 17 B. T. A. 504; *Staub Coal Co.*, 16 B. T. A. 584; *Northwestern Motor Car Co.*, 15 B. T. A. 1276; and *East Market Street Hotel Co.*, 11 B. T. A. 796.

The action of the respondent in this respect is, therefore, approved.

The petitioner further contends that it is entitled to deduct in each of the years 1921, 1923 and 1926, on account of depreciation or exhaustion of the

leasehold interest acquired by petitioner May 18, 1921, 1/99th of the value of the leasehold, to wit, 1/99th of \$640,000. We agree with petitioner that, although no value could be included in invested capital by reason of the limitation of section 331 of the Revenue Acts of 1918 and 1921, the cost as determined from the fair market value of the property acquired for its stock may be used as a basis for computing deductions for exhaustion over the term thereof for the years 1921 and 1923. *Ben T. Wright, Inc.*, 12 B. T. A. 1149. [60]

As to the allowance of exhaustion for the year 1926, we must be governed by the provisions in that respect contained in the Revenue Act of 1926, which are as follows:

Sec. 204. (c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that

(Exceptions not material herein)

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

(8) If the property (other than stock or securities in a corporation a party to a reorganization) was acquired after December 31, 1920, by a corporation by the issuance of its stock or securities in connection with a transac-

tion described in paragraph (4) of subdivision (b) of section 203 (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money in addition to such stock or securities,) then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

Section. 203. (i) As used in this section the term "control" means the ownership of at least 50 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

The petitioner acquired the contract for lease on May 18, 1921. The provisions with respect to recognizable gain or loss in a transaction of the kind here involved are the same in the 1921 Act as in the 1926 Act, though stated differently.

Since the facts in this proceeding bring it squarely within the [61] above quoted provisions of the 1926 and 1921 Acts, it follows that for the year 1926, no deduction for exhaustion of the lease is properly allowable.

As a deduction for exhaustion is allowable in 1921 and 1923 it remains for us to determine the fair market value of the property acquired by petitioner.

It appears that petitioner was incorporated March 30, 1921, pursuant to the contract for lease, for the

purpose of acquiring this lease. The contract for lease was assigned to C. J. Milliron upon condition that he carry out the provisions of such contract, one of which was to cause the petitioner to execute the lease therein provided for. The lessor corporation had been incorporated, pursuant to the contract for lease, January 15, 1921. Practically, petitioner, although it did not actually execute the lease until May 20, 1921, acquired it May 18, 1921, the date of the transfer to it of the contract for lease by C. J. Milliron and wife. To hold otherwise would be to regard the form rather than the substance of the transaction. See *William Penn Co.*, 23 B. T. A. 516; *The Hotel Waldorf Co.*, 22 B. T. A. 430; and *Martha Realty Co.*, 22 B. T. A. 342. The term of the lease is 99 years commencing January 1, 1921.

As we have found the value of the leasehold to be \$640,000, in our opinion, the value may be ratably exhausted over the term of the lease for the years 1921 and 1923. However, under the provisions of the Revenue Act of 1926, no deduction can be allowed on account of the exhaustion of the lease for the year 1926.

Judgment will be entered under Rule 50. [62]

[Title of Court and Cause.]

NOTICE OF SETTLEMENT.

The attached proposed determination of deficiency under the opinion of the United States Board of

Tax Appeals decided November 23, 1931, will be presented to the Board for settlement on the

This notice of proposed determination is submitted in accordance with the decision of the Board without prejudice to the Commissioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

(Signed) C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Of Counsel:

CHESTER A. GWINN,

JOHN R. GASKINS,

Special Attorneys, Bureau of Internal Revenue.

[63]

STATEMENT

IT:AR:E-8

FHS

Returns Examined

	Year	Form
Fifth Street Building, Los Angeles, California	1921	1120
	1923	1120

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1921	\$33,072.77	\$16,361.81	\$16,710.96
1923	2,212.98	2,212.98	None

The United States Board of Tax Appeals in its decision sustained the action of the Unit in its letter dated July 10 1929, for the taxable year 1926, which disclosed a deficiency in tax of \$1,142.72. [64]

Fifth Street Building

Year ended December 31, 1921

Schedule 1

Adjustments to Net Income

Net income as disclosed by deficiency letter, dated April 19, 1926	\$87,361.96
Less: Amortization of leasehold	6,464.64
	<hr/>
Net income as corrected	\$80,897.32

Schedule 2

Invested Capital

Invested capital as reported on return	\$491,740.26
Add:	
Stock sold May 12, 1921	.01
Stock sold June 3, 1921	1,109.59
	<hr/>
Total	\$492,849.86
Deduct:	
Stock issued for lease	483,945.20
	<hr/>
Invested capital as adjusted	8,904.66

Schedule 3

Computation of Tax

Excess Profits Tax Under Section 302

Income	Credit	Balance	Rate	Tax
\$20,000.00	\$3,000.00	\$17,000.00	20%	\$ 3,400.00
60,897.32		60,897.32	40%	24,358.93
<hr/>	<hr/>	<hr/>		<hr/>
\$80, 897.32	\$3,000.00	\$77,897.32		\$27,758.93

Fifth Street Building

Year ended December 31, 1921

Schedule 3 (Continued)

Brought forward		\$27,758.93
	Income Tax	
Net taxable income	\$80,897.32	
Less:		
Profits tax	27,758.93	
	<hr/>	
Taxable at 10%	\$53,138.39	
Tax at 10%		\$ 5,313.84
		<hr/>
Total tax assessable		\$33,072.77
Tax previously assessed		16,361.81
		<hr/>
Deficiency in tax		\$16,710.96

Year ended December 31, 1923

Schedule 4

Adjustments to Net Income

Net income as disclosed by deficiency letter dated April 29, 1927	\$26,168.48
Less:	
Amortization of leasehold	6,464.65
	<hr/>
Net income as corrected	\$19,703.83

Schedule 5

Computation of Tax

Net taxable income	\$19,703.83
Less:	
Credit of	2,000.00
	<hr/>
	\$17,703.83
Income tax at 12½%	\$ 2,212.98
	<hr/>

Correct tax liability	\$ 2,212.98
Tax previously assessed	2,212.98
	<hr/>
Additional tax to be assessed	None

[Endorsed]: United States Board of Tax Appeals. Filed Jan. 6, 1932. [66]

[Title of Court and Cause.]

MOTION FOR RE-CONSIDERATION AND RE-HEARING OF DECISION PROMULGATED NOVEMBER 23, 1931.

Petitioner in the above entitled proceeding, Fifth Street Building, a corporation, by C. J. Milliron and E. S. Brashears, its attorneys, respectfully moves the Board of Tax Appeals for a re-consideration of the decision promulgated November 23, 1931, in the above entitled actions and also a rehearing thereof, upon the following grounds:

1. That the Board, in its decision assumed and predicated the same upon the false and erroneous assumption that the gift to C. J. Milliron of the lease involved was made January 1, 1921, while the evidence and facts found disclose that said gift was made upon November 2, 1920.

2. That the Board failed to find the value of said lease at the date of said gift to C. J. Milliron of said lease, to-wit, November 2, 1920, and that its value on said last mentioned day was \$640,000.00, according to the uncontradicted testimony. [67]

3. That the Board overlooked the fact that said gift of the lease to C. J. Milliron was made prior to

January 1, 1921, and therefore, under Section 202 (a) (2) of the Revenue Act of 1921 the cost of acquisition was the value of said lease on the date of said gift, to-wit, November 2, 1920, and its value at said date was \$640,000.00, according to the uncontradicted testimony, being the same value as found by the Board as of January 1, 1921 and May 20, 1921; and in view of the fact that the gift of the lease was made November 2, 1920, and its value was \$640,000.00 on said date, the Board should have held that the cost to C. J. Milliron of said lease was \$640,000.00 and not nothing, as found by the Board, and that the Fifth Street Building was entitled to use as invested capital the sum of \$640,000.00, the cost to the previous owner, C. J. Milliron.

4. In determining the amount upon which depreciation or exhaustion of the leasehold might be deducted for the year 1926, the Board erroneously, and contrary to law, found that no amount could be deducted, basing its decision upon the provisions of Sec. 204 (c) of the Act of 1926 in connection with the provisions of Sec. 204 (a) and Sec. 203 (i) of said Act. This determination of the Board was erroneous and contrary to law in that Sec. 204 (c) provides that the basis shall be the same as provided in (a) and (b) of Sec. 204 for the purpose of determining gain or loss upon the sale or other disposition of property, and that said Section 204 (b) provides that the basis for determining gain or loss from the sale of property shall be the cost, or in the case of property described in paragraphs 1, 4 or 5 of said [68] Subdivision (a), the basis therein provided; while Sec. 204 (a) (4) referred to provides:

“In property acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition.”

The decision of the Board is, therefore, contrary to law in that it failed to consider the provisions of said Section 204 (a) (4) in arriving at its determination.

ARGUMENT

We are aware that the Board is not in the habit of granting re-considerations nor re-hearings of cases decided, but we believe that the cases at bar present a situation which justifies, and where the petitioner is entitled to, at least a re-consideration of the decision, if not a re-hearing. It is not a case where the petitioner has failed to present evidence, or failed to present the matter in its brief and argument, but is a case where the decision entirely overlooks and ignores the fundamental question of law involved in the cases presented, namely, that the gift of the leasehold interest was made to C. J. Milliron November 2, 1920, and by the undisputed evidence in the case the value of such lease at the time of such gift was \$640,000.00, and that, therefore, the cost to the previous owner, to-wit, C. J. Milliron, was \$640,000.00 its value at the date of acquisition, and that the petitioner was, therefore, entitled to include, as a part of its invested capital for the year 1921, such cost to the previous owner, to-wit, \$640,000.00. While the findings of fact by the Board shows that the gift was made November 2, 1920, there is no finding as to the value of such [69]

gift on such date, although the evidence is uncontradicted that such value was \$640,000.00, being the same value as such lease was on January 1, 1921 and May 20, 1921, as found by the Board in its decision. Nor is there any attempt in the decision to pass upon or decide the question fully presented in the briefs of petitioner, that the cost to the previous owner was the value of the lease at the date of gift, or that such value was the cost at which the petitioner was entitled to include such leasehold interest as a part of its invested capital. Thus the question presented for the determination of the Board by the Petitioner is entirely ignored. It is not stated, nor intimated in the remotest way that the gift was not made November 2, 1920, or that the cost to the previous owner is to be determined in the same manner as gain or profit and that the gift having been made previous to January 1, 1921, such cost was to be based upon value of the gift at the time of acquisition. The same fault lies in the decision in determining the amount of depreciation or exhaustion deducted. The contentions of the petitioner being based upon the fact that the gift of the leasehold was made prior to December 1, 1920, to-wit, November 2, 1920.

If the gift of the leasehold to C. J. Milliron had been made on or subsequent to January 1, 1921, there would have been no contention that the petitioner was entitled to include as part of its invested capital the sum of \$640,000.00, the cost to the previous owner, nor would there have been any contention as to the right to deduct for depreciation and exhaustion of the leasehold the amounts contended for

by petitioner if the gift had been made on or subsequent to December 31, 1920, and the [70] cases would never have been presented to the Board for its decision.

Therefore, the decision in this case entirely ignores the chief and really only points made by the petitioner. The decision does not even mention the contentions of the petitioner. It is an utter failure to decide the case presented, and therefore, we most respectfully submit that in view of this oversight petitioner is entitled to a re-consideration—if not a re-hearing.

THE ENTIRE QUESTION WAS FULLY PRESENTED IN THE BRIEFS OF PETITIONER.

It is not our contention, nor do we deem it necessary to re-argue the questions above indicated, which the decision entirely ignores. All these questions were fully and elaborately covered by the opening and reply briefs of petitioner to which reference is hereby made. We will confine ourselves to certain high lights in the decision which it may be proper to comment upon in support of this motion.

THE CONTRACT FOR A LEASE AND THE TERMS OF SUCH LEASE WERE FULLY DETERMINED AND SETTLED PRIOR TO JANUARY 1, 1921, TO-WIT, ON NOVEMBER 1, 1920.

From a reading of the decision we are unable to determine—especially in view of the findings of fact—how and why the Board failed to mention and

utterly ignored the fact that the so-called contract for a lease, which under the laws of the State of California constituted a lease, was given by W. A. Faris and R. M. Walker to C. J. Milliron prior to January 1, 1921, and also prior to December 31, 1920, to-wit, on November 2, 1920. Although it is not mentioned or suggested in the decision, the [71] only possible reason we can conceive for the Board ignoring that such gift was made on November 2, 1920, is that the Board took the view that the contract for a lease between Bilicke and Dohrmann on the one part, and Faris and Walker on the other part, executed November 1, 1920 did not constitute a lease and there was no lease until after January 1, 1921. As just stated, there is nothing in the decision to suggest that such was the reason for the Board ignoring the contentions of the petitioner, and therefore we are left entirely in the dark as to this matter. Assuming that such was the reason, we wish to take the liberty of calling attention to the facts found by the Board and the legal affect of such contract of November 1, 1920, under the laws of and decision of the courts of the State of California. Federal tribunals must construe contracts and the rule of property as established by the courts of the State where the contract is made or enforceable.

“Where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will,

if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even although the decisions of the state courts, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into.”

Warburton v. White, 176 U. S. 484, 496; 44 L. Ed. 555, 559.

“It is also well settled that where a course of [72] decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the federal courts.” (Italics ours.)

Bucher v. Cheshire R. Co., 125 U. S. 555, 583; 31 L. Ed. 795, 798.

According to the findings of fact, on November 1, 1920, an agreement was entered into between Gladys Bilicke and A. B. C. Dohrmann, first parties, and W. A. Faris and R. M. Walker, second parties, in which the first parties, as executors of the estate of A. C. Bilicke, deceased, agreed to cause to be executed, a certain lease of the real property involved in this action, substantially in form of an indenture of the lease thereto attached and marked Exhibit

“A”. (Decision pp. 3-4). It is further found that on November 2, 1920, said Faris and Walker addressed a letter to C. J. Milliron, a copy of which appears in the decision, by which the above contract to execute a lease, a copy of which contract was thereto attached, was given by W. A. Faris and R. M. Walker to C. J. Milliron. (Decision p. 5) It was further found that on the same day, to-wit, November 2, 1920, C. J. Milliron addressed to and delivered to W. A. Faris and R. M. Walker a letter accepting the gift, a copy of which is to be found in the decision. (Decision pp. 5 and 6). It thus appears that the agreement to execute a lease was executed, and as a part of such agreement the terms of such lease were fully agreed upon, all prior to January 1, 1921, and further that such agreement was transferred, as a gift, by W. A. Faris and R. M. [73] Walker to C. J. Milliron, on November 2, 1920. In the decision no cognizance is taken of these facts. Apparently it is assumed that the lease was entered into on and after January 1, 1921, which is not a fact.

A CONTRACT TO MAKE A LEASE IS A LEASE
WHERE THE TERMS HAVE BEEN
FULLY AGREED UPON.

The effect of this agreement was fully discussed by petitioner in its reply brief, (see pp. 29-39). As we pointed out, “The mere fact that the term is to commence at a future date does not affect the question as to whether a contract is a lease or a contract to make a lease.” (Pet. Rep. Brief p. 31). We quoted extensively from the case of *Pacific I. Co. v. Jones*, 164 Cal. 260, wherein it was held that where

a party had agreed to execute a lease upon certain specified terms it was not necessary to execute a formal lease. (Pet. Rep. Brief pp. 32-34 and 35). In further support of the contention of petitioner that the agreement of November 1, 1920, between Gladys Bilicke and A. B. C. Dohrmann, on the one part, and W. A. Faris and R. M. Walker, on the other part, constituted a lease, petitioner referred to the case of *Levin v. Saroff*, 54 Cal. App. 285; 201 Pac. 961, and quoted extensively therefrom. (Petitioner's Reply Brief pp. 35-37). We take the liberty of re-quoting the following language in the last cited case,

“Plaintiffs’ theory of the case is that the agreement herein set out was an agreement to make a lease in the future and not a lease. To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and [74] manner of payment.”

Levin v. Saroff, 54 Cal. App. 285, 289-290;
201 Pac. 961, 962-963.

By the terms of the above agreement of November 1, 1920, all of the above essentials to a valid lease existed, namely, first, the extent and boundaries of the property leased was agreed upon; second, a definite and agreed term was agreed upon; and, third, a definite and agreed price of rental, and the time

and manner of payment of rental was agreed upon. Again, in the case of *Levin v. Saroff*, *supra*, it was further said:

“When a party refuses to execute the lease according to the contract thus made the other has a right to fall back on the written propositions as originally stated, and the absence of the formal agreement contemplated is not material.”

Petitioner's Reply Brief, p. 37.

Further, as pointed out in Petitioner's Reply Brief, p. 37, in case of a refusal by one party to execute a formal lease, as agreed upon, the other part has a right to bring an action for specific performance, or an action for damages. (Petitioner's reply brief, pp. 37-38)

Therefore, whether or not the contract of November 1, 1920, between Bilicke and Dohrmann on the one part, and Faris and Walker on the other part, be called a contract to make a lease or a lease, matters not. It was a lease to commence at a future time which could be enforced, and was, therefore, a thing of value, which contract was given by Faris and Walker to C. J. Milliron on November 2, 1920.

No mention is to be found in the decision of this [75] aspect, but it is apparently assumed that no lease existed prior to January 1, 1921. In view of the facts, and of the briefs of petitioner filed herein, we respectfully submit that the petitioner is at least entitled to a ruling upon this question and not to have it utterly ignored.

CONCLUSION.

We do not deny that the Board may, under certain circumstances, refuse to discuss or to pass upon questions raised in the briefs, but we do respectfully submit that when the whole contention is based upon a certain contention as to the law, that the Board should not entirely ignore the basic contention in the case and say nothing whatsoever about it. As we stated above, if the gift had been made on or after January 1, 1921, these cases would never have been before the Board, or if these leases had been entered into on and after December 31, 1920, the question of amortization would never have been presented.

We, therefore, respectfully submit that the petitioner is entitled to a re-consideration at least, if not a re-hearing in the above entitled cases.

Respectfully submitted,
CLARK J. MILLIRON
EDW. S. BRASHEARS
CHAS. E. WATKINSON

Attorneys for Petitioner.

[Endorsed]: U. S. Board of Tax Appeals. Filed
Jan. 12, 1932. [76]

[Title of Court and Cause.]

MOTION FOR RECONSIDERATION AND
AMENDMENT OF BOARD'S DECISION

Comes now the Commissioner of Internal Revenue,
by his attorney, C. M. Charest, General Counsel for

the Bureau of Internal Revenue and prays that the Board reconsider its decision in this proceeding promulgated on November 23, 1931, and amend the same so as to include a finding of the cost of the lease to petitioner.

A memorandum in support of this motion is attached hereto.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHESTER A. GWINN,
JOHN R. GASKINS,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed Jan. 25, 1932. [77]

[Title of Court and Cause.]

MEMORANDUM IN SUPPORT OF
RESPONDENT'S MOTION TO RECONSIDER
AND AMEND THE BOARD'S DECISION.

Cost Is Basis for Computing Depreciation of a
Capital Asset Acquired After March 1, 1913

The Board found as a fact that the 99 year lease acquired by the petitioner on May 18, 1921, in exchange for its capital stock of the par value of \$640,000, had a value on January 1, 1921 and May 20, 1921 of \$640,000. It did not find the cost to the petitioner of the lease, nor did it find the value of

the stock issued therefor.

“Section 234 (a) (7) of the Revenue Act of 1918 and the applicable portion of Section 234 (a) (7) of the Revenue Act of 1921 are identical and read as follows:

“Sec. 234 (a). That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions:

(7) A reasonable allowance for exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence’.”

The basis for the computation of depreciation in the case of property acquired subsequent to March 1, 1913, is its cost. Where property is acquired by a corporation in exchange for its stock, the basis for the depreciation deduction is the value of the stock. The failure to establish this value leaves the taxpayer without a basis for the computation of depreciation.” (Kennedy Construction Company, 4 B. T. A. 276.) [78]

This proposition is fully discussed in Peavy-Byrnes Lumber Co., 25 B. T. A., in which the Board said:

“The assets paid in for stock, with which we are here concerned, constituted tangible property, and, under the Revenue Acts of 1918 and 1921, may be included in invested capital at their actual cash value at the time when so paid in i. e., July 28, 1913. Also, since the timber

was acquired by the Peavy-Byrnes Co., on July 28, 1913, which was subsequent to March 1, 1913, cost is the basis for computing depletion allowances. There is no controversy respecting the correctness of these propositions of law. It follows that the problem now presented is to find from the evidence before us, the actual cash value of the timber in question as of July 28, 1913, for purposes of invested capital, and the cost thereof to the Peavy-Byrnes Co. for purposes of depletion, if cost was not the same as the actual cash value.

“The parties to the contract involved were dealing at arm’s length, and hence evidence respecting the actual cash value of the assets exchanged for the stock may be considered in arriving at the value of the stock. Conversely, evidence tending to establish the value of the stock may be considered in determining the value of the assets exchanged therefor. William Ziegler, Jr., 1 B. T. A. 186; Napoleon B. Burge, et al., 4 B. T. A. 732; Rose C. Pickering, et al., 5 B. T. A. 670, and decisions cited.”

The statute and the regulations alike provide that depreciation, including exhaustion and obsolescence and also depletion and gain or loss from the sale or other disposition of property acquired subsequently to February 28, 1913, shall be based upon the cost of the acquisition of the property. Cost means the price paid in money or money’s worth. If property other than money is exchanged for the asset to be

depreciated it means fair value of such consideration.

With respect to property acquired subsequently to February 28, 1913 in exchange for stock the fair market value of the property as of the date of acquisition may be material as a matter of evidence for the determination of the value of the stock paid therefor, but it does not necessarily represent the cost of such property. It is necessary to determine the value of the stock paid for the property before the cost can be ascertained. [79] The purchaser may have made a good or bad buy. The actual value of the assets acquired may have been far in excess of the value of the thing parted with or vice versa. Gain or loss is computed and depreciation and depletion are allowed upon the basis of the cost of the property acquired and not upon the basis of its value.

In the case at bar the Board has found the value of the lease on January 1, 1921 and May 20, 1921, but it did not find the cost of the lease to the petitioner, nor did it find the value of the stock paid by the petitioner for the lease. Until the value of the stock as of the date of acquisition of the lease is ascertained the decision of the Board falls short of determining the ultimate fact upon which its opinion should be based, i. e., the cost of the lease as of May 18, 1921.

It is respectfully submitted that the Board should reconsider and revise its decision so as to include a finding of fact therein as to the cost of the lease

or the value of the capital stock paid therefor.

(Signed) C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

CHESTER A. GWINN,

JOHN R. GASKINS,

Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Jan. 25, 1932. [80]

[Title of Court and Cause.]

MOTION AND CORRECTED NOTICE
OF SETTLEMENT.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue and requests leave to withdraw the Notice of Settlement and Statement of Recomputation under Rule 50 filed by the respondent on January 6, 1932, on account of an error of computation, and to substitute therefor the attached Notice of Settlement and Statement of Recomputation.

(Signed) C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

CHESTER A. GWINN,

JOHN R. GASKINS,

Special Attorneys,

Bureau of Internal Revenue. [81]

GC:R

TRANSCRIPT OF ACCOUNT

Fifth Street Building,
Los Angeles, California
Docket No. 16627

Year 1923

Tax assessed, original	\$2,212.98
Tax paid	2,212.98
Tax liability	2,209.90
Overpayment	\$ 3.08 [82]

STATEMENT

IT:AR:E-8

FHS

Returns Examined

	Year	Form
Fifth Street Building,	1921	1120
Los Angeles, California	1923	1120

	Tax Liability			Over-
Year	Tax Liability	Tax Assessed	Deficiency	assess-
				ment
1921	\$34,181.86	\$16,361.81	\$17,820.05	
1923	\$ 2,209.90	2,212.98		\$3.08

The United States Board of Tax Appeals in its decision sustained the action of the Unit in its letter dated July 10, 1929 for the taxable year 1926, which disclosed a deficiency in tax of \$1,142.72. [83]

Year ended December 31, 1921

Fifth Street Building

Schedule 1

Adjustments to Net Income.

Net income as disclosed by deficiency letter, dated April 19, 1926	\$87,361.96
Less: Amortization of leasehold	4,053.56
	<hr/>
Net income as corrected	\$83,308.40

Schedule 2

Invested Capital

Invested capital as reported on return	\$491,740.26
Add:	
Stock sold May 12, 1921	.01
Stock sold June 3, 1921	1,109.59
	<hr/>
Total	\$492,849.86
Deduct:	
Stock issued for lease	483,945.20
	<hr/>
Invested capital as adjusted	\$ 8,904.66

Schedule 3

Computation of Tax

Excess Profits Tax Under Section 302

Income	Credit	Balance	Rate	Tax
\$20,000.00	\$3,000.00	\$17,000.00	20%	\$ 3,400.00
63,308.40		63,308.40	40%	25,323.36
<hr/>	<hr/>	<hr/>		<hr/>
\$83,308.40	\$3,000.00	\$80,308.40		\$28,723.36

Year ended December 31, 1921

Fifth Street Building.

Schedule 3—continued

Brought forward \$28,723.36

INCOME TAX

Net taxable income \$83,308.40

Less:

Profits tax 28,723.36

Taxable at 10% \$54,585.04

Tax at 10% \$ 5,458.50

Total tax assessable \$34,181.86

Tax previously assessed 16,361.81

Deficiency in tax \$17,820.05

Year ended December 31, 1923

Schedule 4

Adjustments to Net Income

Net income as disclosed by deficiency
letter dated April 29, 1927 \$26,168.48

Less:

Amortization of leasehold 6,489.25

Net income as corrected \$19,679.23

Schedule 5

Computation of Tax

Net taxable income \$19,679.23

Less:

Credit of 2,000.00

Income tax at 12 $\frac{1}{2}$ %	\$17,679.23
	2,209.90
Correct tax liability	\$ 2,209.90
Tax previously assessed	2,212.98
	<hr/>
Overassessment	\$ 3.08

[Endorsed]: United States Board of Tax Appeals.
Filed Jan. 26, 1932. [85]

[Title of Court and Cause.]

OBJECTIONS TO MOTION
AND CORRECTED NOTICE OF SETTLEMENT
FILED BY COMMISSIONER.

Comes now Fifth Street Building, Petitioner in the above matter by its Counsel and objects to the recomputation proposed, and files herewith an alternative computation showing the correct computation of the tax in accordance with the decision in the above entitled action promulgated November 23, 1931, and further moves the Board that the question of the computation of the tax under Rule 50 be continued until after the determination of the Motion of Petitioner for re-consideration of the decision and re-hearing of this case, heretofore filed.

C. J. MILLIRON,

EDW. S. BRASHEARS,

Attorneys for Petitioner. [86]

STATEMENT

IT:AR:E-8

FHS

Returns Examined

	Year	Form
Fifth Street Building	1921	1120
Los Angeles, California	1923	1120

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1921	\$33,072.77	\$16,361.81	\$16,710.96
1923	2,212.98	2,212.98	None

The United States Board of Tax Appeals in its decision sustained the action of the Unit in its letter dated July 10, 1929 for the taxable year 1926, which disclosed a deficiency in tax of \$1,142.72. [87]

Year ended December 31, 1921.

Fifth Street Building

Schedule 1

Adjustments to Net Income

Net income as disclosed by deficiency letter, dated April 19, 1926	\$87,361.96
Less: Amortization of leasehold	6,464.64
Net income as corrected	\$80,897.32

Schedule 2

Invested Capital

Invested capital as reported on return	\$491,740.26
Add:	
Stock sold May 12, 1921	.01
Stock sold June 3, 1921	1,109.59
Total	\$492,849.86

Deduct:

Stock issued for lease	483,945.20
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Invested capital as adjusted	8,904.66
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Schedule 3

Computation of Tax

Excess Profits Tax Under Section 302

Income	Credit	Balance	Rate	Tax
\$20,000.00	\$3,000.00	\$17,000.00	20%	\$3,400.00
60,897.32		60,897.32	40%	24,358.93
\$80,897.32	\$3,000.00	\$77,897.32		\$27,758.93

[88]

Year ended December 31, 1921

Fifth Street Building

Schedule 3 (Continued)

Brought forward	\$27,758.93
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Income Tax

Net taxable income	\$80,897.32
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Less:

Profits tax	27,758.93
-------------	-----------

Taxable at 10%	\$53,138.39
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Tax at 10%	\$ 5,313.84
------------	-------------

Total tax assessable	\$33,072.77
----------------------	-------------

Tax previously assessed	16,361.81
-------------------------	-----------

Deficiency in tax	\$16,710.96
-------------------	-------------

Year ended December 31, 1923

Schedule 4

Adjustments to Net Income

Net income as disclosed by deficiency letter dated April 29, 1927	\$26,168.48
Less:	
Amortization of leasehold	6,464.65
	<hr/>
Net income as corrected	\$19,703.83

Schedule 5

Computation of Tax

Net taxable income	\$19,703.83
Less:	
Credit of	2,000.00
	<hr/>
	\$17,703.83
Income tax at 12½%	2,212.98
	<hr/>
Correct tax liability	\$ 2,212.98
Tax previously assessed	2,212.98
	<hr/>
Additional tax to be assessed	None

[Endorsed]: United States Board of Tax Appeals.
Filed Feb. 5, 1932. [89]

[Title of Court and Cause.]

PETITIONER'S SECOND MOTION
FOR RECONSIDERATION AND REHEARING
OF DECISION PROMULGATED NOVEMBER
23, 1931 AND STATEMENT.

The petitioner says:

1. Petitioner's First Motion for Reconsideration and Rehearing

The Board has on file the petitioner's first Motion for Reconsideration and Rehearing of Decision Promulgated November 23, 1931 wherein the petitioner respectfully takes exception to the following—

(a) That the Board failed to find clearly by a definite statement that C. J. Milliron received as a gift on November 2, 1920 a certain contract for lease mentioned therein, and

(b) That the value of such gift or contract for lease on November 2, 1920 was \$640,000.

The petitioner submitted with its motion a complete statement of its position and argument in support thereof. [90]

The respondent under date of February 29, 1932 submitted its brief in opposition to petitioner's motion for reconsideration.

The petitioner on this date and under separate cover is submitting to the Board a restatement in rebuttal to support its first motion for reconsideration.

2. Proceedings under the Board's Rule 50.

The respondent submitted on January 6, 1932 Notice of Settlement wherein it computed a deficiency of \$16,710.96 for the year 1921 and no deficiency for the year 1923. In such notice of settlement the respondent pointed out that the Board in its decision rendered November 23, 1931 sustained the determination of a deficiency in tax of \$1,142.72 for the year 1926. The three years, i. e., 1921, 1923 and 1926 are those now in controversy as covered by the Board decision rendered.

Subsequent thereto, to wit: on January 26, 1932, the respondent filed with the Board a Motion and Corrected Notice of Settlement wherein he computed under the Board's decision a revised deficiency in tax of \$17,820.05 for the year 1921 and an overpayment of \$3.08 for the year 1923. The amount of deficiency of \$1,142.72 for the year 1926 was not disturbed.

Thereafter, to wit: on February 5, 1932, the petitioner submitted Objections to Motion and Corrected Notice of Settlement filed by the Commissioner.

3. Hearing under Rule 50.

Counsel for the petitioner and the respondent appeared before the Hon. Stephen J. McMahon in Chambers on March 2, 1932 for preliminary hearing under the Board's Rule 50. At such hearing, counsel [91] for the respondent argued for and insisted upon its computation of the deficiency for the year 1921 set forth in its Motion and Corrected Notice of Settlement.

The respondent's revised computation of deficiency for 1921 is predicated upon the proposition that the contract for lease was assigned by C. J. Milliron to Fifth Street Building (petitioner herein), on May 18, 1921, and accordingly that the value of such contract for lease, found by the Board to have been \$640,000 on that date, should be exhausted, to permit annual deductions from income of the petitioner, over the period of some 98 and a fraction years. The term of the lease provided for was 99 years from January 1, 1921 and the respondent's first computation under notice of settle-

ment had been based upon allowing the petitioner an annual deduction from income on account of the exhaustion of the leasehold, equal to $1/99$ of the value of \$640,000 found by the Board. The respondent claims its first computation of deficiency for 1921, so computed, was therefore in error and that the deduction for 1921 on account of the exhaustion of the leasehold should be $228/365$ (or on its own theory should have stated $228/365$) of the annual exhaustion computed by dividing the value of the leasehold by 98 and a fraction years rather than by 99 years mentioned in the lease actually executed between Fifth and Broadway Investment Company, and Fifth Street Building. That results in a reduction of the exhaustion of leasehold for the year 1921 by an amount of \$2,411.08 from the allowance theretofore shown in the respondent's original notice of settlement.

Counsel for the petitioner contended that the entire case had been presented to the Board, and the petitioner believes the Board so understood it, on the theory and assumption that Fifth Street Building [92] (petitioner herein) took over the benefits and assumed the burdens with respect to the leasehold as of January 1, 1921—the date from which the lease for 99 years commenced. It was understood, until the dispute arose as the result of the respondent's motion and corrected notice of settlement, that the petitioner was entitled to deduct from income for 1921 an amount equal to one full year's exhaustion of the value of \$640,000 for the leasehold based upon its 99-year term. In support

thereof, the following is quoted from the closing sentences of the Board's decision rendered November 23, 1931:

“The term of the lease is 99 years commencing January 1, 1921.

“As we have found the value of the leasehold to be \$640,000, in our opinion, the value may be ratably exhausted over the term of the lease for the years 1921 and 1923.”

Those statements in the Board's decision at least should be interpreted fairly and in proper relation to other factors in the case, and according to the basis of reporting income and expense for the year 1921 reflected in the 60-day letter with respect to which basis no issue had arisen or question been presented at the time of the original hearing before the Board. The respondent reads into the opinion of the Board, specifically the part above quoted, the right to deny the petitioner a deduction from income for the year 1921 of an amount equal to one full year's annual exhaustion of the value of the leasehold. As previously stated, the respondent's position is based upon the contention that until November 18, 1921 the petitioner did not acquire the contract for lease and did not have a property interest therein.

Thus, for the first time at the preliminary hearing under Rule 50, the respondent by this dispute, and as mentioned by the counsel for [93] the petitioner at such hearing, clearly indicated that, if the contract for lease was not acquired by the petitioner until November 18, 1921, the benefits

under the leasehold, being the rental received with respect to the property, should not be taxed as income to it for the period of January 1 to May 17, 1921. This would conform to the respondent's position in denying a deduction from income of the petitioner equal to a full year's exhaustion of the leasehold.

Despite any statement of counsel for the petitioner at the preliminary hearing under Rule 50, when the foregoing point was raised, that any specific amount of rental on the property was received and reported as income by the petitioner for the year 1921, it has now been determined that the petitioner reported for the year 1921 a monthly rental of \$12,500, or a year's rental of \$150,000, paid by Faris-Walker, a corporation, sublessee, for the so-called Bilieke property for that year. The petitioner refers to the Findings of Fact in the Board's decision wherein the following is included:

“On January 2, 1921, Clark J. Milliron, as first party, and W. A. Faris and R. M. Walker, copartners, doing business under the firm name and style of Fifth Street Store, as second parties, executed a lease wherein and whereby the premises described in the agreement for lease of November 1, 1920, were leased to Faris and Walker from January 1, 1921, to December 31, 1921, and for such longer time thereafter as the parties shall agree at a rental of \$150,000 payable in twelve equal installments of \$12,500.

* * * * *

“On March 1, 1922, a lease was entered into

covering the same premises between Fifth Street Building and Faris-Walker, a California Corporation, for a term of 30 years beginning on March 1, 1922, and ending February 28, 1952, unless sooner ended in accordance with the provisions of the lease, for a net monthly rental of \$12,500 * * *.”

It is now clear from the above quotations that the \$150,000 (or \$12,500 a month) rental received in 1921, as indicated, arose as the result of a sub-lease by Milliron to Faris and Walker, and not by [94] reason of a sub-lease from Fifth Street Building (petitioner herein) to Faris and Walker. As a matter of fact, the first sub-lease by Fifth Street Building, after acquiring the leasehold interest of the Bilicke property, as lessee by assignment from Milliron, was made to Faris-Walker, a corporation, on March 1, 1922 for a term of 30 years thereafter. Presumably inasmuch as Fifth Street Building took over the burden of paying rental of the Bilicke property to the principal lessor, Fifth and Broadway Investment Company, it could have effectively demanded the benefit of any rental on that property paid by Faris-Walker, a corporation, for the period November 18 to December 31, 1921 by proper proceeding in equity. In any event on the position that the petitioner herein did not acquire the leasehold interest, as the original lessee by assignment, until November 18, 1921, Fifth Street Building, as petitioner, should not as a matter of fact or law be taxed on that portion of the \$150,000 rental received for the year

1921 which is apportionable to the period January 1 to November 17, 1921, inclusive.

On that position, the petitioner did not receive as taxable income any rental on the Bilicke property accrued for the period January 1 to November 17, 1921, inclusive. However, by assignment, agreement, gift, or otherwise, the petitioner herein did report and there is reflected in the 60-day letter from which this appeal was taken, the entire \$150,000 rental received on the Bilicke property for the year 1921. On these facts and the position now taken, four months' rental at \$12,500 a month and 17/31 of the monthly rental of \$12,500 for May 1921, or an amount of \$56,854.91, should be eliminated from taxable income reflected in the 60-day letter and the Board's decision rendered November 23, 1931. [95]

Likewise that amount of \$56,854.91 should be treated as paid-in surplus of Fifth Street Building, the petitioner herein, in addition to the amount of \$640,000, value of the leasehold turned in to the company as capital for stock issued.

4. Authorities Discussed.

The petitioner, accordingly hereinafter submits a second motion for reconsideration and rehearing of the Board's decision promulgated November 23, 1931 to permit these additional facts to be stipulated into the record or proven for the purposes of the record to the end that a proper adjustment and decision of tax liability for this petitioner may be made. The reasons herein stated for such reopening of the case for the purpose indicated are in

addition to the reasons advanced and the purpose stated in support of the first motion for reconsideration and rehearing.

This request of the petitioner is eminently fair and necessary for the Board to arrive at a re-determination of tax liability for the year 1921 upon a correct basis. There is adequate precedent for such reopening.

Relation to the Substance of Adjustment Requested.

In *Rouss v. Bowers*, 30 Fed. (2d) 628, affirming 4 B. T. A. 516, certiorari denied 279 U. S. 853, the facts were that up to May 13, 1918, the taxpayer was the owner of an extensive mercantile business, and on that date he sold the business as a going concern for a price equal to its book value as shown by the closing of the books on December 31, 1917. The books were kept on the accrual basis, and they were not closed on May 13, 1918, the date of the sale. The purchaser of the business reported in its income tax return for 1918 [96] the earnings of the business for the full calendar year, while the seller returned no income on account of earnings of the business during the period of his ownership in 1918. The Commissioner of Internal Revenue recast the returns and assessed against the seller a pro rata part of the year's earnings, namely, $132/365$; this fraction representing the ratio between the number of days elapsing in the period from January 1 to May 13 and the total number of days in the year. This resulted in a tax against the seller, the validity of which he contested in the suit.

It was held that the income from the business and property up to the date of sale or its transfer to the purchaser, was income to the seller (the taxpayer there involved), and not income to the purchaser or assignee, even though under the agreement of sale it was intended that the purchaser should take up the income for the entire year 1918. This case also is similar to that of Fifth Street Building because the Commissioner in both instances has used a fraction to prorate the income or deductions to the periods before and after the date of acquisition of property by the assignee.

Thus it would seem that there can be no question as a matter of law that Fifth Street Building (petitioner in the instant case) should not have reported and the 60-day letter should not have included the rental income on the Blicke property for the period January 1 to May 17, 1921, inclusive. The Board's decision should be corrected to accord with the facts brought out by the discussion at the preliminary hearing under the Board's Rule 50. [97]

Relating to the Matter of Procedure.

The petitioner would respectfully call the Board's attention to a case which parallels that of the instant petitioner wherein the record was opened and the first decision of the Board amended as the result of a dispute arising from additional facts disclosed at a preliminary hearing under Rule 50. That case is *LaSalle Cement Co. v. Commissioner*, 19 B. T. A. 806.

“The proceedings having been set down for further hearing for the purpose of permitting

a recomputation of the deficiencies upon the basis laid down in the opinion at 15 B. T. A. 1127, it developed that the evidence given at the original hearing was inaccurate. Findings modified and previous decision reversed.”

It is interesting to note that in the LaSalle Cement Company case, the record was reopened and the decision of the Board changed, presumably at the instance of the Commissioner, but in any event in his favor. In the instant case of Fifth Street Building, it is the petitioner which is making the request. The same rights and privilege should be accorded to the petitioner as in other cases to the Commissioner in order to arrive at a proper and just determination of tax liability.

In *Griffiths v. Commissioner*, 50 Fed. (2d) 782, the court on review of the Board's decision remanded the case for further proceedings in the Board and thus directed that the record made by the Board in the first instance be reopened to introduce evidence regarding a waiver of the statute of limitations. The issue with respect to the waiver was raised for the first time in the Circuit Court of Appeals by the Government in the case on review.

In that case it was also held that the decision of the Board did not become final until after disposition of petition for rehearing. Thus it would seem in the instant case of Fifth Street [98] Building that the petitioner is well within proper procedure in requesting reconsideration and reopening of its case to permit the record to be adjusted

and the Board's decision amended in order to eliminate non-taxable income under the particular facts herein presented.

5. The Petitioner Accordingly Respectfully Moves:

(a) That the record in the case be reopened to permit by stipulation or proof the introduction of the facts showing the erroneous inclusion of income which should not be taxable for the year 1921, and that such reconsideration and rehearing be permitted on the issue thus involved to the end that the Board's decision may be revised to accord with the facts.

(b) That its petition to the Board be considered amended by adding thereto additional alleged errors and facts as follows:

That the Commissioner erroneously included and/or failed to eliminate from taxable income of the petitioner for the year 1921 certain rental income paid by Faris and Walker, or Faris-Walker, a corporation, under a certain lease to Faris and Walker, or Faris-Walker, for that year from C. J. Milliron, with respect to the so-called Bilicke property.

That there should be added to the invested capital of the petitioner for the year 1921 a certain amount of paid-in or capital surplus representing rental received on the so-called Bilicke property by C. J. Milliron and turned over to Fifth Street Building (petitioner herein) for its separate use and benefit.

That the petitioner did report, and there is

reflected in the 60-day letter and the Board's decision rendered November 23, 1931, income of approximately \$56,854.91 as rental on the so-called Bilicke property for the period January 1 to May 17, 1921, inclusive; that such rental was not received as income by the petitioner and as such did not belong to it nor was it taxable thereon; that the rental so received was paid to C. J. Milliron under a lease from him to Faris and Walker, or Faris-Walker, a corporation, between whom a lease on the Bilicke property was made with respect to the period covering the calendar year 1921, and that such rental was turned over to the [99] petitioner during 1921 for its separate use and benefit which would constitute paid-in or capital surplus.

Respectfully submitted,

O. R. FOLSOM-JONES,

Counsel for Petitioner

c/o Brewster, Ivins & Phillips,

805 Fifteenth Street, N. W.,

Washington, D. C.

March 5, 1932.

[Endorsed]: United States Board of Tax Appeals.
(Filed Mar. 5, 1932. [100])

[Title of Court and Cause.]

ERRATA

Regarding Dates (to be corrected)

PETITIONER'S SECOND MOTION FOR
RECONSIDERATION AND REHEARING OF
DECISION PROMULGATED NOVEMBER 23,
1931 AND STATEMENT.

(Filed March 5, 1932)

The petitioner in its second motion for reconsideration specified certain erroneous dates which should be corrected as follows:

On—

Page 4, line 25

Page 5, line 2

Page 6, lines 10, 13, 16-17, and 20

where the dates November 17 or November 18, whichever the case may be, appear, the word "November" should be changed to "May".

O. R. FOLSOM-JONES,

Counsel for Petitioner

c/o Brewster, Ivins & Phillips,
805 Fifteenth Street, N. W.,
Washington, D. C.

[Endorsed]: Filed March 10, 1932. [101]

[Title of Court and Cause.]

ORDER.

The Board having promulgated its opinion in the above entitled proceeding on November 23, 1931, and the respondent having, on January 6, 1932, filed

notice of settlement and statement of proposed determination of deficiency under Rule 50, and the petitioner having on January 12, 1932 filed a motion to reconsider such opinion and also for rehearing; and the respondent having, on January 25, 1932, filed a motion for the reconsideration of such opinion and the amending thereof to include therein the cost of lease to the petitioner; and the respondent having on January 26, 1932, filed a motion and corrected notice of settlement requesting leave to withdraw the notice of settlement and statement of recomputation under Rule 50 filed on January 6, 1932, and to substitute therefor the notice of settlement and statement of recomputation attached to such notice; and the petitioner having, on February 25, 1932, filed its objections to respondent's motion filed January 26, 1932, objecting to such proposed corrected recomputation and filing therewith an alternative computation, being the same computation as that filed by respondent on January 6, 1932, and also a motion that the question of the computation of the tax under Rule 50 be continued until after the determination of the motion of petitioner for reconsideration of the opinion and rehearing; and hearing having been had on March 2, 1932, under Rule 50, counsel for petitioner and respondent appearing and presenting their respective arguments; and the petitioner having on March 5, 1932 filed a second motion for a re-opening of the record, and amendment of the petition and reconsideration and rehearing, now therefore, it is

ORDERED that the actions hereinabove men-

[Title of Court and Cause.]

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Counsel for Petitioner

c/o Brewster, Ivins & Phillips,

805 Fifteenth Street, N. W.,

Washington, D. C.

[Endorsed]: Filed March 10, 1932. [101]

[Title of Court and Cause.]

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ORDERED that the actions hereinabove men-

tioned made and filed herein by the petitioner and respondent respectively be and the same hereby, each and all, are denied; and it is

ORDERED FURTHER that the proposed recomputation filed by the respondent under date of January 6, 1932, and the recomputation filed by the petitioner under date of February 25, 1932, being the same in all respects, be and the same hereby are approved. (See memorandum attached hereto.)

(Signed) STEPHEN J. McMAHON,
Member.

Dated: Washington, D. C.,
March 15, 1932 [102]

[Title of Court and Cause.]

MEMORANDUM

Counsel for the petitioner contends that Faris & Walker transferred the contract for lease on November 2, 1920, to Milliron by gift and that Milliron paid or gave nothing for such assignment; that under section 202 (a) (2) of the Revenue Act of 1921 the "cost of acquisition" as used in section 331 of the Revenue Act of 1921 to the previous owner, Milliron, is the value of such contract on November 2, 1920, and is therefore includable in invested capital at its value, or \$640,000; and that since under section 204 (a) (8), 1926, the basis for exhaustion and depreciation is the same as it would be in the hands of the transferor, that Milliron, the transferor, received the contract as a gift prior to December 31, 1920, that section 204 (a) (4) of the

1926 Act is therefore applicable and that the basis for exhaustion and depreciation is the fair market value of such property at the time of acquisition, or \$640,000.

Counsel for petitioner directed our attention to certain cases, including California cases and statutes, contending that the transaction between Faris & Walker and Milliron as evidenced by the letter dated November 2, 1920, from the former to the latter and the letter under same date from the latter to the former involves the transfer of property and is therefore governed by the law of California. We do not question the correctness of this contention but find that the California cases so cited are not in point or are clearly distinguishable.

It is interesting to note that under the law and decisions of the courts of California dealings between an attorney and his client for the benefit of the former are closely scrutinized and are presumptively invalid. Civ. Code of California, §2235, *Cooley v. Miller & Son*, 156 Cal. 510, P. 981; *Magee v. Brenneman*, 188 Cal. 562, 206 P. 37; *In re Witt's Estate*, 198 Cal. 407, 245 P. 197; *In re Butt's Estate*, 256 Pac. (Cal) 200, 201; *Thornley v. Jones*, 274 Pac. (Cal.) 93. Although we do not base our conclusion as to whether or not this transaction constituted a gift on these decisions, we refer to them merely as indicative of the status of the law and attitude of the courts of California relative to such transactions.

It has been said that a gift is a gratuity, and not only does not require a consideration, but there can

be none; if there is a consideration for the transaction it is not a gift. 28 C. J. 621. [103]

A gift is defined by section 1146 of the Civil Code of California as follows:

A gift is a transfer of personal property made voluntarily, and without consideration.

In *Noel v. Parrott*, 15 Fed. (2d) 669, the court states as follows:

* * * It is an essential characteristic of a gift, however, that it be a transfer without consideration. If there is a consideration for the transaction, it is not a gift. 22 C. J. 621.

In *Blair v. Rosseter*, 33 Fed. (2d) 286, the court states:

A gift is generally defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor.

The letter of Faris & Walker of November 2, 1920 to Milliron in no way indicates that a gift was intended except as it may be inferred from the inclusion of the word "give" in the phrase "we hereby give and assign to you". On the contrary such letter states a consideration as follows: "In consideration of your assuming all of the duties and obligations imposed upon us by reason of our contract * * * we hereby give and assign to you all our right, title and interest in said agreement, it being understood that you are to assume all of our obligations either directly or indirectly as a result of this agreement."

Clearly, according to the letter, Faris and Walker wanted to be relieved of all obligations, direct or indirect, arising out of such contract to lease and emphasized such purpose by a repetition thereof.

Milliron in his letter of November 2, 1920, to Faris & Walker states:

Your gift to me today of your contract of November 1st to execute a lease * * * is hereby accepted and I agree to assume all your obligations thereunder and to hold you free and clear of any liabilities as a result thereof.

Petitioner contends that the agreement to assume such obligations was nothing more than a condition subsequent and did not constitute a consideration. This contention is without merit. In our opinion to discuss this contention would unnecessarily lengthen this memorandum and is not essential in view of *Jameson v. Shepardson*, 257 Pac. (Cal.) 157. In this case it was also contended that the agreement in writing involved therein stated that:

* * * said assignment shall be a gift, by the party of the first part to the party of the second part, of the interest of the party of the first part under said contract and in and to said land. * * * [104]

The court after quoting section 1146 of the Civil Code of California and quoting and citing from 28 C. J. 620, states as follows:

Measured by the authorities cited to support the text, which we have quoted from *Corpus Juris*, the agreement entered into between the

plaintiff and the defendant Marin J. Shepardson cannot be classed as a gift. It was an undertaking on the part of said defendant to relieve the plaintiff from the obligations which she had assumed, when entering into the contract with the Sierra Vista Lands Company, which alone, irrespective of other considerations mentioned, took the agreement out of the category of gifts.

The assignment of the contract for lease by Faris & Walker to Milliron on November 2, 1920, was therefore not a gift.

While we did not discuss this question in our promulgated opinion we did not overlook it in our consideration of the case; and we see no occasion for changing the result now.

Section 331 of the Revenue Act of 1921 applicable in this proceeding in the determination of invested capital provides that "if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition * * *". We are asked to construe the words "cost of acquisition" as used in section 331, *supra*, to mean "value" as used in section 202 (a) (2) of the Revenue Act of 1921. This section provides that in the case of property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss shall be the fair market value or value thereof at the time of such acquisition. Section 202 (a) and section 202 (a) (2) clearly disclose that the words "cost" and "value" are of different meaning for section 202 (a) provides that

the basis for determining gain or loss shall be the cost thereof while section 202 (a) (2) changes the basis of cost to the basis of value as to gifts made prior to December 31, 1920, an exception to section 202 (a).

Section 331 itself impliedly prohibits such construction for it provides that for invested capital purposes the "value" of any asset so transferred or received shall be taken at its cost of acquisition." This language is clear and unambiguous and is not open to the construction contended for. If the word "value" were substituted for the word "cost" as contended by the petitioner it would result in legislation rather than a construction of such section.

In our opinion promulgated November 23, 1931, we held that the previous owner Milliron paid nothing for the assignment to him by Faris and Walker of the contract for lease, which holding is confirmed by the statement of counsel for the petitioner in his letter of February 12, 1932, filed with the Board subsequent to the hearing, and since the cost of acquisition to Milliron is the value to be taken for invested capital purpose in this proceeding, our holding in this respect in our opinion promulgated November 23, 1931, is therefore correct. [105]

The basis upon which depreciation or exhaustion is to be allowed for the year 1926 on the lease in this proceeding is found in section 204 (a) of the Revenue Act of 1926. This section provides that the basis for such purposes with respect to property acquired after February 28, 1913, shall be the cost

of such property. However, certain exceptions are made, which are found in subsections (1) to (11) inclusive. Subsection (8) is applicable herein and states that

* * * the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made;

Since no gain or loss was recognized under section 202 (c) (3) of the Revenue Act of 1921, which applied in the year in which the transfer was made, the basis applicable cannot be increased or decreased.

If the assignment had been a gift from Faris and Walker to Milliron, transferor of the petitioner, subsection (4) of section 204 (a), *supra*, would apply, but since it was not a gift, and the transaction does not come within any of the other exceptions provided for in section 202 (a), *supra*, the basis for the computation of depreciation or exhaustion is the cost of such property to the transferor, which as heretofore stated was nothing.

As we have regarded the substance rather than the form in this matter and it is apparent that the petitioner, although it did not acquire the contract for lease until May, 1921, received the benefits and assumed the burdens thereof as of January 1, 1921, the date of the commencement of the 99-year term of the lease, and as the lease itself had actually been exhausted a full year, in our opinion the petitioner is entitled to deduct 1/99th of \$640,000 which is

the fair market value and the cost of such contract for lease to petitioner, for the years 1921 and 1923, respectively.

Respondent moved that the opinion promulgated November 23, 1931, be amended to include the cost of the contract for lease to petitioner. It is conceded that the basis for exhaustion for the years 1921 and 1923 is cost. The basis fixed in such opinion was deemed to be cost and is referred to in the opinion as "the cost as determined from the fair market value of the property". Since we have found the fair market value to be \$640,000, it follows that this figure represents the cost. This is the only construction to which our opinion is fairly open on this phase of the proceeding. While the found the fair market value to be \$640,000, it fol-
proved upon, we deem it unnecessary to amend the opinion in this respect.

[Seal] (Signed) STEPHEN J. McMAHON,
Member. [106]

United States Board of Tax Appeals

Washington

Docket Nos. 16627, 29264, 45537

FIFTH STREET BUILDING,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

The opinion in the above entitled proceeding

of such property. However, certain exceptions are made, which are found in subsections (1) to (11) inclusive. Subsection (8) is applicable herein and states that

* * * the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made;

Since no gain or loss was recognized under section 202 (c) (3) of the Revenue Act of 1921, which applied in the year in which the transfer was made, the basis applicable cannot be increased or decreased.

If the assignment had been a gift from Faris and Walker to Milliron, transferor of the petitioner, subsection (4) of section 204 (a), *supra*, would apply, but since it was not a gift, and the transaction does not come within any of the other exceptions provided for in section 202 (a), *supra*, the basis for the computation of depreciation or exhaustion is the cost of such property to the transferor, which as heretofore stated was nothing.

As we have regarded the substance rather than the form in this matter and it is apparent that the petitioner, although it did not acquire the contract for lease until May, 1921, received the benefits and assumed the burdens thereof as of January 1, 1921, the date of the commencement of the 99-year term of the lease, and as the lease itself had actually been exhausted a full year, in our opinion the petitioner is entitled to deduct 1/99th of \$640,000 which is

the fair market value and the cost of such contract for lease to petitioner, for the years 1921 and 1923, respectively.

Respondent moved that the opinion promulgated November 23, 1931, be amended to include the cost of the contract for lease to petitioner. It is conceded that the basis for exhaustion for the years 1921 and 1923 is cost. The basis fixed in such opinion was deemed to be cost and is referred to in the opinion as "the cost as determined from the fair market value of the property". Since we have found the fair market value to be \$640,000, it follows that this figure represents the cost. This is the only construction to which our opinion is fairly open on this phase of the proceeding. While we found the fair market value to be \$640,000, it followed upon, we deem it unnecessary to amend the opinion in this respect.

[Seal] (Signed) STEPHEN J. McMAHON,
Member. [106]

United States Board of Tax Appeals

Washington

Docket Nos. 16627, 29264, 45537

FIFTH STREET BUILDING,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

The opinion in the above entitled proceeding

and hearing having been had under Rule 50 on March 2, 1932; and the first recomputation under Rule 50 by the Commissioner filed January 6, 1932, (such recomputation being the same as that filed February 25, 1932 by the petitioner with his objections to a second recomputation filed by respondent January 26, 1932) having been approved by order dated March 15, 1932, now therefore, it is

ORDERED and DECIDED that there is a deficiency in tax for the year 1921 in the amount of \$16,710.96; that there is no deficiency in tax for the year 1923, and that for the year 1926 there is a deficiency in tax of \$1,142.72.

(Signed) STEPHEN J. McMAHON,
Member.

ENTERED March 16, 1932. [107]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF
TAX APPEALS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Fifth Street Building, a corporation, in support of this its petition filed in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled "The Revenue Act of 1926" as amended by Section 603 of the Act of Congress approved May 29, 1928, entitled "The Revenue Act of 1928", for the review of the decision of the United States Board of Tax Ap-

peals promulgated November 23, 1931, a final order of determination having been entered on March 16, 1932, respectfully shows to this Honorable Court as follows:

I

STATEMENT OF THE NATURE OF THE CONTROVERSY

BRIEF STATEMENT OF FACTS

There are two questions presented in this appeal, namely, (1) whether Petitioner is subject to tax on rentals accrued and paid to Petitioner's predecessor in interest under a lease prior to the date of the acquisition by Petitioner of said lease, or whether said rentals are a part of Petitioner's contributed capital; (2) whether Petitioner is entitled to include in its [108] invested capital for the year 1921 the sum of \$640,000.00 representing the cost to it of certain leasehold rights which were exchanged for its stock.

Petitioner was incorporated under the laws of the State of California on March 30, 1921 and ever since has been and now is a corporation having its principal place of business in the City of Los Angeles, State of California.

Petitioner on May 18, 1921, in exchange for substantially all of its stock, acquired from Clark J. Milliron a contract of lease dated November 1, 1920. This latter contract was made by Gladys Billicke and A. B. C. Dohrmann, as first parties, and W. A. Faris and R. M. Walker, as second parties, and provided, among other things, that the first parties would organize a corporation and transfer certain properties to it and that they would

cause said corporation to make a 99 year lease on said premises to a corporation to be organized by second parties. All the terms, covenants and conditions of the 99 year lease were set forth in a copy attached to and made a part of said contract. W. A. Faris and R. M. Walker, parties of the second part, also agreed to execute, at the time of the signing of the lease, a copy of which was attached to the agreement, a guarantee, a copy of which was attached, by which they guaranteed the faithful performance, by the lessee, of the lease, until the building therein specified should be erected.

On November 2, 1920, C. J. Milliron received as a gift in writing from W. A. Faris and R. M. Walker all their right, title and interest in said agreement in consideration of his assuming their duties and obligations imposed by said contract of November 1, 1920. Prior to the incorporation of the Petitioner as provided for in aforesaid contract of lease, and the transfer to Petitioner of the agreement of lease, and on January 2, 1921, said C. J. Milliron, as lessor, executed a certain indenture of lease to Faris-Walker, a copartnership doing business under the name of "Fifth Street Store", as [109] lessee, of the premises described in the lease attached to said lease agreement, for one year from the 1st day of January, 1921, and for such longer term as might be agreed upon between the parties, at the annual rental of \$150,000.00, payable in advance in twelve (12) equal monthly installments of \$12,500.00, commencing on January 1, 1921, which monthly installments were paid when due.

The 99 year lease referred to in said contract of November 1, 1920 was executed by the two aforementioned corporations on May 20, 1921 and on said date W. A. Faris and R. M. Walker signed the guarantee for the faithful performance of the lease contract until the building therein specified should be erected.

On November 1, 1920, W. A. Faris and R. M. Walker, by an instrument in writing, agreed to pay the sum of \$30,000.00 on December 31, 1920, as a consideration for the cancellation of the then existing leases on the property covered by the above mentioned contract of November 1, 1920. On December 31, 1920, said \$30,000.00 was paid by Faris-Walker and a receipt was delivered, showing the cancellation, as of that date of the then existing leases on the property, which had been entered into on December 27, 1911.

The lease contract dated November 1, 1920 had a value on November 2, 1920 of \$640,000.00; its value on January 2, 1921 and also on May 18, 1921 was \$640,000.00.

The Respondent, in his sixty day letter from which the appeal to the United States Board of Tax Appeals was taken, disallowed any value whatsoever to the lease contract and reduced Petitioner's invested capital on account thereof; the Respondent also disallowed any deduction whatsoever for amortization or depreciation of Petitioner's leasehold interests on account of lack of evidence of the value thereof. Petitioner contended before the United States Board of Tax Appeals that the transfer on November 2, 1920 by Faris and Walker [110] to

Clark J. Milliron of the lease contract dated November 1, 1920 constituted a gift and that therefore in the determination of Petitioner's invested capital the value of said lease contract on that date constituted part of its invested capital; Petitioner also contended that it was entitled, in the determination of its net taxable income, to a deduction for amortization or depreciation of its lease contract based upon the fair market value of the lease contract on the date acquired, to-wit: May 18, 1921.

The Board of Tax Appeals held, among other things, that the transaction between W. A. Faris and R. M. Walker and Clark J. Milliron did not constitute a gift and that therefore the value of the said contract on November 2, 1920 did not constitute a part of Petitioner's invested capital. However, the Board did hold that Petitioner was entitled to take an annual deduction for depreciation or amortization of its leasehold contract based upon the fair market value of the lease contract on the date acquired by Petitioner which the Board found to be \$640,000.00. After the promulgation of the Board's opinion and prior to the rendition or entry of judgment the Respondent filed a motion wherein he urged the Board to allow depreciation on the leasehold contract only from the date acquired by Petitioner, to-wit, May 18, 1921 whereupon Petitioner filed a motion, which among other things, requested the Board to eliminate from Petitioner's net taxable income for the year 1921 as found by it, the sum of \$56,854.91, erroneously included in Petitioner's income for the year 1921 by said Board, and which represented rentals accrued to and received by C. J. Milliron on the lease prior to the

acquisition thereof by Petitioner and when said lease was owned by Clark J. Milliron and during the period from January 1, 1921 to and including May 17, 1921; the motion further requested the Board to reopen the case and permit the introduction of evidence to prove that the said rentals did not constitute [111] taxable income of Petitioner and that such rentals were paid in to Petitioner as a part of its capital.

The Board of Tax Appeals denied Respondent's motion as well as Petitioner's motion and held that Petitioner was entitled to depreciation on its leasehold contract for the entire year 1921, and that the rentals paid to and received by C. J. Milliron prior to the acquisition by Petitioner of said lease constituted income of the Petitioner.

Petitioner is contending in this appeal that it is not subject to tax on the rentals accruing on the lease contract during the period from January 1, 1921 to and including May 18, 1921 and which were actually paid to C. J. Milliron prior to the acquisition of said lease by Petitioner, and that Petitioner's invested capital as determined by the Board should be increased by the sum of \$640,000.00, being the fair market value on November 2, 1920 of the leasehold thereafter transferred in exchange for its stock, and by the further sum of \$56,854.91 acquired by Petitioner as contributed capital.

II

STATEMENT OF PROCEEDINGS HERETOFORE HELD.

The Commissioner of Internal Revenue, Respondent herein, on the 19th day of April, 1926, mailed

to Petitioner what is termed a deficiency letter wherein the Respondent proposed additional taxes for the year 1921 in the sum of \$19,684.69. Within sixty days thereafter and on June 2, 1926, Petitioner filed its appeal with the United States Board of Tax Appeals wherein it alleged, among other things, that the Respondent had erroneously excluded from Petitioner's invested capital for the year 1921, the cost to it of a certain leasehold contract which cost represented the fair market value on November 2, 1920 of said lease contract to its predecessor in interest, [112] C. J. Milliron. Petitioner further alleged that the Respondent had erroneously disallowed a deduction for depreciation or amortization of said lease contract based upon the fair market value thereof at the date of acquisition. Petitioner contended that its predecessor in interest, said Clark J. Milliron, had acquired said lease contract on November 2, 1920 as a gift from W. A. Faris and R. M. Walker.

Petitioner further alleged that the fair market value of the lease contract on each of the dates, November 2, 1920, January 2, 1921 and May 18, 1921, was \$640,000.00 which sum was a part of Petitioner's invested capital and also constituted the basis for the determination of Petitioner's depreciation deduction for its leasehold contract.

The United States Board of Tax Appeals held that the transaction whereby Clark J. Milliron received said leasehold contract was not a gift and inasmuch as he had no cost for said lease contract that no part of the value of said leasehold contract

on November 2, 1920, constituted Petitioner's invested capital. The Board of Tax Appeals, however, held that Petitioner was entitled to compute its depreciation or amortization of its leasehold contract on the basis of its fair market value, which the Board found to be \$640,000.00, on January 1, 1921 and May 20, 1921.

After the promulgation of the Board's opinion, but prior to the entry or rendition of judgment, the Respondent filed a motion with the Board wherein he requested the Board to allow depreciation on the leasehold contract only from the date of its acquisition by Petitioner, to-wit, May 18, 1921, whereupon Petitioner filed a motion requesting the Board to exclude from Petitioner's net taxable income the amount of rentals accruing on said leasehold contract for the period from January 1, 1921 to May 17, 1921, inclusive, the period prior to the time of the acquisition of said leasehold contract by [113] Petitioner. The Board of Tax Appeals denied the motion of the Respondent as well as the motion of Petitioner and held that Petitioner was entitled to take depreciation for the full year 1921, and that the rentals paid to and received by C. J. Milliron prior to the acquisition by Petitioner of said lease constituted income of the Petitioner.

III

DESIGNATION OF COURT OF REVIEW.

Petitioner, being aggrieved by the said Findings of Fact, Opinion, Decision and Order, and being a corporation with its principal place of business

in the City of Los Angeles, State of California, desires a review thereof, in accordance with the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to which the said Petitioner made its income tax return for the calendar year 1921.

IV

ASSIGNMENT OF ERRORS.

The Petitioner, as a basis of review, makes the following assignment of errors:

(1) The Board of Tax Appeals erred in including in Petitioner's net taxable income for the year 1921, any portion of the rent from January 1, 1921 to May 17, 1921, which had accrued and had been received by C. J. Milliron, as lessor, from Faris-Walker, a copartnership, as lessee under the terms of that certain lease dated January 2, 1921. [114]

(2) The Board of Tax Appeals erred in denying Petitioner's motion made on or about March 5, 1932 to amend its petition setting forth that the Respondent erroneously included and/or failed to eliminate from Petitioner's net taxable income for the year 1921 rentals paid by Faris and Walker to and received by Clark J. Milliron pursuant to the lease dated January 2, 1921 for the period from January 1, 1921 to May 17, 1921, inclusive, and in refusing to reopen said case to permit by stipulation or proof the introduction of facts showing the erroneous inclusion of said sum which does not

constitute taxable income to Petitioner for the year 1921.

(3) The Board of Tax Appeals erred in failing to include, as part of Petitioner's invested capital, the sum of \$56,854.91 received by Petitioner from C. J. Milliron, and which amount was paid by Faris and Walker and received by Milliron as rental prior to the transfer of the contract November 1, 1920, to the Petitioner, and in refusing to reopen said case to permit, by stipulation or proof, the introduction of facts showing said error.

(4) The Board of Tax Appeals erred in failing to include in Petitioner's invested capital for the year 1921 the additional sum of \$640,000.00 representing the cost to Petitioner of certain leasehold rights.

(5) The Board of Tax Appeals erred in failing to hold that the cost basis of Petitioner's leasehold interest was \$640,000.00.

(6) The Board of Tax Appeals erred in failing to hold that Clark J. Milliron on November 2, 1920 received as a gift the leasehold interest transferred to and acquired by Petitioner on May 18, 1921, in exchange for its stock and that said leasehold interest at the time acquired by said Clark J. Milliron on said November 2, 1920 had a value of \$640,000.00.

(7) The Board of Tax Appeals erred in failing to find a value of \$640,000.00 of the leasehold contract on May 18, 1921. [115]

(8) The Board of Tax Appeals erred in admit-

ting over Petitioner's objection Respondent's Exhibits A-1, A-2 and A-3.

(9) The Board of Tax Appeals erred in finding that on November 1, 1920 Faris and Walker paid \$30,000.00 to the estate of A. C. Billicke for the cancellation of certain leases dated December 27, 1911, and in not finding that Faris-Walker, a partnership, paid said \$30,000.00 on December 31, 1920, for the cancellation of three certain leases dated December 27, 1911, between A. C. Billicke, Lessor, and Muse-Faris-Walker Company, a corporation, Lessee, under which said leases Faris-Walker, a partnership, occupied the premises until December 31, 1920.

(10) The Board of Tax Appeals erred in determining a deficiency against Petitioner for the year 1921 in the sum of \$16,710.96, or in any sum whatsoever.

(11) The Board of Tax Appeals erred in failing to find that Petitioner had overpaid its taxes for the year 1921 and was, therefore, entitled to a refund of said overpayment.

(12) The Board of Tax Appeals erred in holding that dealings between an attorney and client are presumptively invalid and in failing to find and hold that the gift of the contract of November 1, 1920 by W. A. Faris and R. M. Walker to Clark J. Milliron was a valid transaction.

WHEREFORE, your Petitioner prays that this Honorable Court may review the said Findings, Opinion, Decision and Order of the United States Board of Tax Appeals and reverse and set aside

the same; and that this Honorable Court direct the entry of a decision by the said Board in favor of Petitioner determining that there is not deficiency in income tax for the year 1921 due from Petitioner, and Petitioner further prays that this Honorable Court direct the Board to determine the amount of any refund or [116] refunds that may be due Petitioner on account of the reversal of the Board's decision.

Petitioner prays for such other and further relief as may seem meet and proper in the premises.

CLARK J. MILLIRON,

518 Fidelity Building,

Los Angeles, California.

THOMAS R. DEMPSEY,

A. CALDER MACKAY,

GEORGE H. P. SHAW,

1104 Pacific Mutual Building,

Los Angeles, California,

Attorneys for Petitioner. [117]

State of California

County of Los Angeles—ss.

A. Calder Mackay being duly sworn, says that he is one of the attorneys for the Petitioner above named and that as such he is duly authorized to verify the attached Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board rendered herein; that he has read the said Petition and is familiar with the statements therein contained, and that the facts set forth therein are true to the best

of his knowledge and belief and that the said Petition is filed in good faith.

A. CALDER MACKAY

Subscribed and sworn to before me this 8th day of September, 1932.

[Seal]

ALICE FABIEN

Notary Public in and for said County and State.

My Commission Expires May 19, 1934.

[Endorsed]: United States Board of Tax Appeals. Filed Sep. 13, 1932. [118]

[Title of Court and Cause.]

NOTICE

To C. M. Charest, Esq., Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent.

Sir:

PLEASE TAKE NOTICE that on the 13th day of September, 1932, the undersigned presented to this Board and filed with the Clerk thereof the Petition of Fifth Street Building, a copy of which is annexed hereto, for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the final order and decision of the Board in the above entitled proceeding entered upon the records of said Board on March 16, 1932.

Dated at Washington, D. C., Sept. 13, 1932.

CHARLES W. HAMEL

LLOYD ANDERSON

Attorney for Petitioner.

Service of a copy of the foregoing is hereby acknowledged this 13th day of Sept. 1932.

C. M. CHIAREST

General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Sep. 13, 1932. [119]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Fifth Street Building, a corporation, in support of this its petition filed in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled "The Revenue Act of 1926," as amended by Section 603 of the Act of Congress approved May 29, 1928, entitled "The Revenue Act of 1928", for the review of the decision of the United States Board of Tax Appeals promulgated November 23, 1931, a final order of determination having been entered on March 16, 1932, respectfully shows to this Honorable Court as follows:

I

STATEMENT OF THE NATURE OF THE
CONTROVERSY

BRIEF STATEMENT OF FACTS

The only question presented in this appeal is whether Petitioner is entitled, in the determination

of its net taxable income for the year 1926, to a deduction for depreciation or amortization of its leasehold rights acquired in exchange for its stock, and if so whether the basis for the computation of said deduction is the fair market value of said leasehold rights at the date acquired by Petitioner, or the fair market value thereof at the date acquired [120] by its predecessor in interest, Clark J. Milliron.

Petitioner was incorporated under the laws of the State of California on March 30, 1921 and ever since has been and now is a corporation having its principal place of business in the City of Los Angeles, State of California.

Petitioner on May 18, 1921, in exchange for substantially all of its stock, acquired from Clark J. Milliron a contract of lease dated November 1, 1920. This latter contract was made by Gladys Billicke and A. B. C. Dohrmann, as first parties, and W. A. Faris and R. M. Walker, as second parties, and provided, among other things, that the first parties would organize a corporation and transfer certain properties to it and that they would cause said corporation to make a 99 year lease on said premises to a corporation to be organized by second parties. All the terms, covenants and conditions of the 99 year lease were set forth in a copy attached to and made a part of said contract. W. A. Faris and R. M. Walker, parties of the second part, also agreed to execute, at the time of the signing the lease, a copy of which was attached to the agreement, a guarantee, a copy of which was attached, by which

they agreed to guarantee the faithful performance, by the lessee, of the lease, until the building therein specified should be erected.

On November 2, 1920, C. J. Milliron received as a gift in writing from W. A. Faris and R. M. Walker all their right, title and interest in said agreement in consideration of his assuming their duties and obligations imposed by said contract of November 1, 1920. Prior to the incorporation of the Petitioner as provided for in aforesaid contract of lease, and the transfer to Petitioner of the agreement of lease, and on January 2, 1921, said C. J. Milliron, as lessor executed a certain indenture of lease to Faris-Walker a copartnership doing business under the name of "Fifth Street Store", as lessee, of the premises described in the lease attached to said lease agreement, for one year from the [121] 1st day of January, 1921, and for such longer term as might be agreed upon between the parties, at the annual rental of \$150,000.00, payable in advance in twelve (12) equal monthly installments of \$12,500.00, commencing on January 1, 1921, which monthly installments were paid when due.

The 99 year lease referred to in said contract of November 1, 1920 was executed by the two aforementioned corporations on May 20, 1921 and on said date W. A. Faris and R. M. Walker signed the guarantee for the faithful performance of the lease contract until the building therein specified should be erected.

On November 1, 1920, W. A. Faris and R. M.

Walker, by an instrument in writing, agreed to pay the sum of \$30,000.00 on December 31, 1920, as a consideration for the cancellation of the then existing leases on the property covered by the above mentioned contract of November 1, 1920. On December 31, 1920, said \$30,000.00 was paid by Faris-Walker and a receipt was delivered, showing the cancellation, as of that date, of the then existing leases on the property, which had been entered into on December 27, 1911.

The lease contract dated November 1, 1920 had a value on November 2, 1920 of \$640,000.00; its value on January 2, 1921 and also on May 18, 1921 was \$640,000.00.

The Respondent, in his sixty day letter from which the appeal to the United States Board of Tax Appeals was taken, disallowed any value whatsoever to the leasehold rights acquired by Petitioner and disallowed any deduction whatsoever for amortization or depreciation of Petitioner's leasehold interests on account of lack of evidence of the value thereof. Petitioner contended before the United States Board of Tax Appeals that the transfer on November 2, 1920 by Faris and Walker to Clark J. Milliron of the lease contract dated November 1, 1920 constituted a gift and that therefore the cost basis to [122] Petitioner of its leasehold rights acquired in exchange for its stock was \$640,000.00, being the fair market value of said leasehold rights on the date acquired by Petitioner, to-wit, May 18, 1921 and also having the same value on the date acquired by its predecessor in interest, Clark J. Milliron, to-wit, November 2, 1920. Petitioner also

contended that it was entitled to use as its cost basis, in determining its annual deduction for depreciation or amortization of its leasehold rights, the said sum of \$640,000.00.

The Board of Tax Appeals held, among other things, that the transaction between W. A. Faris and R. M. Walker and Clark J. Milliron did not constitute a gift and that therefore Petitioner had no basis whatsoever for the determination of its depreciation or amortization deductions.

II

STATEMENT OF PROCEEDINGS HERETOFORE HAD.

The Commissioner of Internal Revenue, Respondent herein, on the 10th day of July, 1929, mailed to Petitioner what is termed a deficiency letter wherein the Respondent proposed additional taxes for the year 1926 in the sum of \$1142.72. Within sixty days thereafter and on August 26, 1929, Petitioner filed its appeal with the United States Board of Tax Appeals wherein it alleged, among other things, that the Respondent had erroneously disallowed as a deduction for the year 1926 depreciation or amortization sustained on its leasehold interest based upon the value thereof at the date acquired of \$640,000.00. Petitioner contended that its predecessor in interest, said Clark J. Milliron, had acquired said lease contract on November 2, 1920 as a gift from W. A. Faris and R. M. Walker.

The United States Board of Tax Appeals held that the transaction whereby Clark J. Milliron received said leasehold contract was not a gift and [123] that therefore no part of the value of said

leasehold contract either on the date acquired by Petitioner or on the date acquired by **Petitioner's** predecessor in interest, Clark J. Milliron, could be used as the basis for determining depreciation or amortization deductions for the year 1926.

This case was consolidated, for hearing and decision before the **United States Board of Tax Appeals**, with the case of *Fifth Street Building v. Commissioner of Internal Revenue*, Docket No. 16627.

III

DESIGNATION OF COURT OF REVIEW.

Petitioner, being aggrieved by the said Findings of Fact, Opinion, Decision and Order, and being a corporation with its principal place of business in the City of Los Angeles, State of California, desires a review thereof, in accordance with the provisions of the Revenue Act of 1926 as amended by the Revenue Act of 1928, by the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to which the said Petitioner made its income tax return for the calendar year 1926.

IV

ASSIGNMENT OF ERRORS.

The Petitioner, as a basis of review, makes the following assignment of errors:

(1) The Board of Tax Appeals erred in holding that Petitioner, in the determination of its net taxable income for the year 1926, was not entitled to a deduction for amortization or depreciation of its leasehold rights acquired by it in exchange for its stock. [124]

(2) The Board of Tax Appeals erred in holding that Petitioner had no basis for the determination of a deduction for depreciation or amortization of its leasehold rights.

(3) The Board of Tax Appeals erred in failing to hold that Petitioner was entitled, in the determination of its depreciation or amortization deductions for the year 1926, to use as the cost basis of its leasehold rights the sum of \$640,000.00.

(4) The Board of Tax Appeals erred in failing to hold that Clark J. Milliron on November 2, 1920 received as a gift the leasehold contract transferred to and acquired by Petitioner on May 18, 1921, in exchange for its stock and in failing to find that said leasehold contract at the time acquired by said Clark J. Milliron on said November 2, 1920 had a value of \$640,000.00.

(5) The Board of Tax Appeals erred in failing to find that the value of the contract of lease on the 18th day of May, 1921, the day the same was acquired by Petitioner, had a value of \$640,000.00.

(6) The Board of Tax Appeals erred in admitting over Petitioner's objection Respondent's Exhibits A-1, A-2 and A-3.

(7) The Board of Tax Appeals erred in finding that on November 1, 1920 Faris and Walker paid \$30,000.00 to the estate of A. C. Billicke for the cancellation of certain leases dated December 27, 1911, and in not finding that Faris-Walker, a partnership, paid said \$30,000.00 on December 31, 1920, for the cancellation of three certain leases dated December 27, 1911, between A. C. Billicke, Lessor, and Muse-Faris-Walker Company, a corporation, Lessee,

under which said leases Faris-Walker, a partnership, occupied the premises until December 31, 1920.

(8) The Board of Tax Appeals erred in holding that dealings between an attorney and client are presumptively invalid and in failing to find and hold [125] that the gift of the contract of November 1, 1920 by W. A. Faris and R. M. Walker to Clark J. Milliron was a valid transaction.

(9) The Board of Tax Appeals erred in determining a deficiency against Petitioner for the year 1926 in the sum of \$1142.72, or in any sum whatsoever.

WHEREFORE, your Petitioner prays that this Honorable Court may review the said Findings, Opinion, Decision and Order of the United States Board of Tax Appeals and reverse and set aside the same; and that this Honorable Court direct the entry of a decision by the said Board in favor of Petitioner determining that there is no deficiency in income tax for the year 1926 due from Petitioner, and Petitioner further prays that this Honorable Court direct the Board to determine the amount of any refund or refunds that may be due Petitioner on account of the reversal of the Board's decision.

Petitioner prays for such other and further relief as may seem meet and proper in the premises.

CLARK J. MILLIRON

GEORGE H. P. SHAW

518 Fidelity Building, Los Angeles, California.

THOMAS R. DEMPSEY

A. CALDER MACKAY

1104 Pacific Mutual Building, Los Angeles, California.

Attorneys for Petitioner. [126]

State of California

County of Los Angeles—ss.

A. Calder Mackay, being duly sworn, says that he is one of the attorneys for the Petitioner above named and that as such is duly authorized to verify the attached Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board rendered herein; that he has read the said Petition and is familiar with the statements herein contained, and that the facts set forth therein are true to the best of his knowledge and belief and that the said Petition is filed in good faith.

A. CALDER MACKAY

Subscribed and sworn to before me this 8th day of September, 1932.

[Seal]

ALICE FABIEN

Notary Public in and for said County and State.

My Commission Expires May 19, 1934.

[Endorsed]: United States Board of Tax Appeals.
Filed Sep. 13, 1932. [127]

[Title of Court and Cause.]

NOTICE

To C. M. Charest, Bureau of Internal Revenue,
Washington, D. C., Attorney for Respondent.
Sir:

PLEASE TAKE NOTICE that on the 13 day of September, 1932, the undersigned presented to this Board and filed with the Clerk thereof the Petition of Fifth Street Building, a copy of which is annexed hereto, for review by the United States Cir-

cuit Court of Appeals for the Ninth Circuit, of the final order and decision of the Board in the above entitled proceeding entered upon the records of said Board on March 16, 1932.

Dated at Washington, D. C., Sept. 13, 1932.

CHARLES P. HAMEL

LLOYD ANDERSON

Attorney for Petitioner.

Service of a copy of the foregoing is hereby acknowledged this 13th day of Sept. 1932.

C. M. CHAREST

General Counsel Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals.
Filed Sep. 13, 1932. [128]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The above entitled cases came on for hearing before the Honorable Stephen J. McMahon, Member, United States Board of Tax Appeals, on the 26th day of May 1930 at Los Angeles, California; the Petitioner was represented by Clark J. Milliron, Esq., and Charles E. Watkinson, Esq., Attorneys-at-Law, Los Angeles, California; the Respondent was represented by M. B. Leming, Esq., (Clarence M. Charest, Esq., General Counsel, Bureau of Internal Revenue.)

Thereupon proceedings were heard and the testi-

mony of the following witnesses was taken before said member:

For Petitioner: O. A. Vickrey, Thurston H. Ross, Alexander Cromwell.

For Respondent: Arthur C. Hurt, R. M. Walker, C. J. Milliron. [129]

The following proceedings were had:

“Mr. LEMING:

* * * * *

It is stipulated that the three appeals of the above-named petitioner described in the caption hereof may be consolidated for hearing, and

It is further agreed that the stipulation as to facts heretofore filed with the Board under Docket Nos. 16627 and 29264, and the exhibits therein mentioned as Petitioner’s Exhibits 1 to 5, inclusive, and Respondent’s Exhibit A, may be regarded as filed, also with respect to Docket No. 45537.

Mr. MILLIRON: In regard to this stipulation I desire, and offer in the stipulation to state, that the Petitioner reserves the right to object to the admission in evidence of the Respondent’s Exhibit A, as provided in the stipulation in regard to all of the cases; that is, it is not intended by this stipulation to admit Respondent’s Exhibit A, except with the understanding that we will object to it at the time it is offered.

The MEMBER: The stipulation will be received with that understanding; do you have something further about the consolidation?

* * * * *

Mr. LEMING: * * * as to petitioner's Exhibit No. 5, the first part of it is an agreement entered into on the 20th day of May, 1921, between Fifth and Broadway Investment Company, a corporation organized and existing under the laws of the State of California, and W. A. Faris and R. M. Walker, of the city of Los Angeles; that agreement refers to a proposed lease; the document which is attached to it is an executed copy of that lease. If counsel will agree that the agreement was executed before the lease, I have no further objection.

The MEMBER: Do you agree to that, Mr. Milliron?

Mr. MILLIRON: Yes; I might explain to the Court that the document was executed before the lease; however the original, and the stipulation states that this is a true copy of the original,—the original in possession of this corporation was attached to it a copy with the names printed in at the time it was executed, however, it was not executed, and the names were not on the lease.

Mr. LEMING: That is right; apparently the executed copy got attached through inadvertence.

Mr. MILLIRON: As I understand there were a number of copies needed at the time, it was all attached together, and ultimately they attached the wrong copy to their files; that is the way it occurred. [130]

Mr. LEMING: That is right.

The MEMBER: It may be so understood; this is the fifth exhibit?

Mr. LEMING: Yes.

* * * * *

Mr. MILLIRON: It is stipulated that the invested capital of the Petitioner has been determined by the Commissioner to be \$8,904.64.

The MEMBER: As appears from the deficiency letter?

Mr. MILLIRON: As appears from the deficiency letter, and that this amount does not include any amount of account of any leasehold.

The MEMBER: Just a moment; is that stipulation acceptable?

Mr. LEMING: That so appears on Page 2 of the deficiency letter, and is agreed to.

The MEMBER: The stipulation being accepted will be received by the Board as being accepted by counsel for the Respondent.

* * * * *

Mr. MILLIRON: In view of the fact that this case is coming before the Board with an answer and a stipulation, I assume it will be advisable to tell the Board what the case is all about, so that we will know where we are going here.

The MEMBER: That is in order; I would like to have you do it.

Mr. MILLIRON: * * * It appears, from the point of view of counsel for the Petitioner, that the only issue in this case of fact, is the value of the lease either at the time it was re-

ceived by Mr. Milliron as a gift, or at the time it was transferred to the corporation, and that the issues of law, as raised, are whether or not under the circumstances in the case the Petitioner is entitled to use that value as invested capital, and furthermore whether or not the Petitioner is entitled to amortization or depreciation of the lease over the life of the lease, based on the value on the date the corporation received it or purchased it for its stock.

* * * * *

Mr. LEMING: Just as a matter to clear the record there, the C. J. Milliron referred to, is also C. J. Milliron, of counsel who has just made the opening statement for the petitioner; I believe that is correct?

Mr. MILLIRON: That is correct." [131]

So much of the evidence as is material and necessary to the determination of the assignments of error set out by Petitioner in its Petitions for Review by this Court of the decision of the Board of Tax Appeals is herein set out in narrative form.

TESTIMONY OF A. VICKREY.

O. A. Vickrey, having been first duly sworn as a witness on behalf of the Petitioner, testified as follows:

Direct Examination

My name is O. A. Vickrey and I am engaged in the real estate and appraising business. I am a member of the Los Angeles Realty Board, the California Real Estate Association and the National

(Testimony of A. Vickrey.)

Real Estate Association. I have been engaged as a real estate broker and appraiser in the City of Los Angeles since 1889—40 years. I have acted as appraiser on city properties of Los Angeles for the Prudential Life Insurance Company of New York; as appraiser of lands and subdivisions for the National Land Insurance Company of Los Angeles, and Federal Land Insurance Company for Los Angeles, Riverside and San Diego County for land insurance policies, and have also appraised realty holdings for bank mergers and also leases running into several millions. I acted as appraiser for the merger of the Merchants National Bank and Hellman Commercial Trust & Savings Bank; also for the Pacific National Bank and National Bank of Commerce, which consolidation failed; also acted as appraiser of leases, leaseholds and other interests for bond houses. I was a member of the Appraisal Board of the Los Angeles Realty Board for two or three years, and afterwards became chairman of the Appraisal Board of the Los Angeles Realty Board for about three years, during which time I was appraising and passing on appraisals approximating millions of dollars of all [132] classes of Los Angeles City property, business, suburban, subdivisions and acres for industrial and manufacturing purposes.

I was recently a member of the Harbor Commission Committee of the different civic bodies of the City of Los Angeles and San Pedro to devise and re-establish new rates and rentals on industrial lands at the harbor; appraisal of the Southern Pacific Company, Atchison, Topeka and Santa Fe Rail-

(Testimony of A. Vickrey.)

ways, Los Angeles Terminal Railway, now Union Pacific Railway, of all their terminal holdings in Los Angeles, San Pedro and Wilmington; also all their harbor lands, dock terminals, harbor and wharf frontages and all other interests they had of similar nature. I acted as witness in establishing values for individuals, also for the City and County of Los Angeles in condemnation suits to acquire property for public use and purposes; also acted as witness in condemnation suits, for the city and county board of education of Los Angeles; also appraised property for individuals for federal income purposes, also for federal inheritance tax purposes; I acted as appraiser for the Hostetter Estate which comprised about four million dollars; Arabella Huntington Estate in Los Angeles County which involved over one million dollars; the Thom Estate comprising nearly two million dollars; the Earl Fowler Estate involving between three and four million dollars. I was appraiser for the city classification yards, railroad, involving over two million dollars; Dominguez and Watson Estate, fronting Truck Boulevard, about two miles northeast of San Pedro and Harbor Boulevard. The Huntington Estate of Southern California involving over fifteen million dollars; the Janss Investment Company, appraisal of stock and bond issue by banks and bond houses and their entire holdings in Holmby Hills, Westwood and entire holding in city, comprising in value in 1928 of fifteen million dollars. I also acted as appraiser for Clifford F. Reid, Incorporated, for the issuance of [133] stocks and bonds which in-

(Testimony of A. Vickrey.)

volved over four million dollars; also the Senator Clark Estate, particularly that part known as the Montana Ranch of 8,000 acres adjoining the City of Long Beach, California.

I made an appraisal of the contract to enter into a lease between Gladys Billicke, A. B. C. Dohrman and Faris and Walker and Mr. Milliron in the early part of 1921 for the purpose of the sale of this to the Fifth Street Building, being the property on the corner of Fifth and Broadway taken over under this agreement of 1920. I was acquainted with the values of leaseholds, property in and around Fifth and Broadway, in the City of Los Angeles, in 1920. I made a further investigation in connection with the property and was acquainted with the conditions before and after the contract was entered into. In my opinion the contract dated November 1, 1920 to make the lease had a value on November 2, 1920 of \$675,000.00. In my opinion the value of that contract on March 30, 1921 was also \$675,000.00; it also had a value, in my opinion, on May 18, 1921 of \$675,000.00; it also had, in my opinion, a value on June 3, 1921 of \$675,000.00.

Cross Examination.

I made my first appraisal of the property at Fifth Street and Broadway, as I recall, in January, 1921 for the Los Angeles Realty Board. There were three appraisals made at different times, the applications for appraisals of the value of the contract for lease having been made by Mr. Milliron. The Realty Board, in making an appraisal, issues a cer-

(Testimony of A. Vickrey.)

tificate founded on the report of the different members of the appraisal committee who are appointed by the Chairman of the Realty Board. As a member of the Realty Board I made this appraisal but do not recall when the first certificate was issued by the Board. I had something to do with all the appraisals made [134] by the Realty Board. The Appraisal Committee, of which there were three, would make their returns for the Realty Board, and then the Realty Board makes up a certificate from the reports of the members of the Appraisal Committee and that is issued to the applicant.

“Q. Now, what was the first report made of any character to the Realty Board on this property?

A. Well, I could not tell you, because I do not have it here.

Q. Well, do you recall this, if the first appraisal was more or less than this one you now give?

A. Well, I do not know; I think they ran higher; I think the appraisal we worked in, at the time I turned it over, was over seven hundred thousand dollars.

Q. Are you aware of the appraisal made for about one hundred and ninety-eight or two hundred thousand dollars?

A. No, I have no recollection of that now.

Q. You do not have any recollection of that at all?

A. No.

(Testimony of A. Vickrey.)

Q. Or any similar amount?

A. No, I do not; under the same conditions, I do not recall.

Q. But you have had something to do with all of the appraisals?

A. I say I think it did, yes, if they came in there.

Q. You want to tell the Board now you have no recollection of any appraisal made for a less sum?

A. Not of any such values, no.

Q. Well, any value less than the one you have testified to?

A. Well, there might have been some variation; it might have reasonably been probably ten per cent, fifteen per cent less, but any such value as you said, no, I do not recollect?

Q. Do you not know, as a matter of fact, Mr. Vickrey, that the first appraisal sent to Mr. Milliron was \$193,000?

A. No, if there was I do not recall anything about it at the present time; that is something that happened ten or eleven years ago. [135]

Q. Well, you want to leave the question that way: You want to leave the Board to understand that you do not know anything about a \$193,000 appraisal made by the Board?

A. I would not say that; such a thing can be possible; I do not have in my mind now that an appraisal of that kind was made.

Q. Is it not a fact that Mr. Milliron took it

(Testimony of A. Vickrey.)

back to the Board because it was not satisfactory to him; do you recall that?

A. Well, it could be possible; we have that happen in a great many instances, yes.

Q. What preparation did you do on this particular matter before you came over here to testify?

A. Do you mean in the—

Q. In the last few days?

A. Why, I made investigations regarding the value of the property and the value of leases, —sales of property.

Q. What did you do to refresh your recollection as to what had been done back there in around January, 1921?

A. I do not know that I made—I did not make any investigation as to any report that was served at that time, or what value was given.

Q. Did you go to the Realty Board to find out there what might have been done about the issuance of certificates of value?

A. Well, I know of the value when the certificates were issued.

Q. Which certificate?

A. Regarding the value that the Realty Board gave Mr. Milliron at that time.

Q. Is that the value to which you have testified?

A. Something on that order, yes; I do not know the exact amount myself,—I could not say.

(Testimony of A. Vickrey.)

Q. But you went there to refresh your recollection?

A. No, I did not go there to refresh my mind.

Q. What did you go there for?

A. To the realty board?

Q. Yes. [136]

A. I did not go to the realty board.

Q. I beg your pardon; I understood you to say you went there.

A. No, I did not.

Q. So you did not go there to refresh your recollection?

A. As to that I do not know.

Q. Have you tried to refresh your recollection from any other papers as to what might have been done?

A. Well, I did not determine the value of this lease upon what investigation I made with the realty board; I determined the value of this lease upon the condition of the property as they exist at the present time and at the time this lease was made, and the knowledge of the situation I had at that time.

Q. The value of the property at the present time; do you say that has something to do with it?

A. Well, I made my investigations now; I made my investigations in the last two or three weeks; close investigations.

Q. To determine its value now?

(Testimony of A. Vickrey.)

A. To determine the value of the lease in 1920 and 1921.

Q. But so far as any action you took in 1921, or so far as any action the Board took, of which you were a member of the committee, you did not make any effort to refresh your recollection on that?

A. No, I did not.

Q. In making your statement as to the value here, Mr. Vickrey, what are you valuing?

A. I am valuing the leasehold interest in this lease, or the contract for the lease.

Q. Now, let us make it clear, what are you valuing, the contract for a lease, or a leasehold?

A. Well, a contract for —

Q. What are you valuing, Mr. Vickrey,—a contract for a lease, or an executed lease?

A. I am valuing a contract for a lease, or the leasehold interest in the contract calling for a lease.

Q. Have you seen the assignment of that contract to Mr. Milliron? [137]

A. I think I have.

Q. What is the date of that assignment?

A. I do not know that I can tell you.

Q. When did you look it up?

A. Why, I think in the last week or ten days—two weeks.

Q. Last week or ten days?

A. And when the contract for the lease was

(Testimony of A. Vickrey.)

all turned over to the realty board,—when the application was made for the appraisal of it.

Q. You know what an assignment is, do you not?

A. Yes.

Q. Did you see an assignment dated January 3d, 1921?

A. On what date?

Q. On or about January 3, 1921?

A. Yes.

Q. Have you got that assignment before you?

A. I have reference here as to the assignment, and I think I saw the assignment, or saw the fully published information as furnished by the realty board at the time the appraisal was made, and it was also shown to me by Mr. Milliron.

Q. This assignment?

A. Yes.

Q. What is the date of it as you have it?

A. Well, the contract was signed by Mr. Milliron November 2nd, or, May 18, 1921.

Q. No, I was asking you about the January 3d assignment; I asked you if you saw an assignment dated on or about January 3d?

A. I do not know that I saw the assignment; I think I did see it.

Q. You do not know whether you did or not, then?

A. I rather think I did; there are so many

(Testimony of A. Vickrey.)

of those papers and assignments, in a general way they were gone over—it does not materially affect the situation, or the value of the lease.

Mr. LEMING: I move to strike that, his Honor will determine that. [138]

The WITNESS: I do not wish to be disrespectful; I am trying to express myself clearly.

Q. By Mr. Leming:

Q. What I am trying to find out is what document that you have before you in the way of an assignment or a contract when you went out to value this property?

A. We had a complete copy of the contract and assignment.

Q. Now, what contract?

A. Of the lease.

Q. Well, whose contract?

A. Well, Mr. Milliron, Faris and Walker, Billicke and Dohrman.

Q. Wait a minute, let us get one contract clear; what contract and between what parties are you referring to?

A. There was a contract between Billicke and Dohrman and Faris and Walker.

Q. All right; the contract between Billicke and Dohrman.

A. Yes.

Q. You had that?

A. Yes.

Q. What other paper did you have?

A. I think we have one from the Faris and

(Testimony of A. Vickrey.)

Walker People,—the Fifth Street Store, I think.

Q. Who to?

A. Mr. Milliron, I think.

Q. All right; what was the date of that one?

A. I do not recall the dates; those dates are not in my mind clearly at all; they were along about that time,—they were all within a year or more, the different assignments of this contract with different people.

Q. Is it not a fact, Mr. Vickrey that what you have just been valuing, and the thing you have testified to was a completed lease?

A. No, I did not understand it that way at all; I never had that in [139] my mind; always a contract for the lease.

Q. Do you have that contract for a lease before you?

A. I think so, yes.

Q. What is the date of it?

A. Well, it is a published form,—a regular form drawn up.”

Redirect Examination

“By Mr. MILLIRON.

Q. Mr. Vickrey, as a member of the original committee of the realty board which appraised this property, do you recall that the realty board—whether or not the realty board sent an appraisal of this lease to Mr. Milliron, and which appraisal was later returned to the realty board to be re-appraised; do you recall that incident?

(Testimony of A. Vickrey.)

The WITNESS: Why, it occurs to me that there was this appraisal returned by you, asking for another appraisal, that is in my mind at that time.

Q. Do you recall in the discussion between yourself and the other members of the committee, of the committee asking Mr. Milliron to appeal before the committee and explain the details of this contract?

A. Yes, I recollect that.

Q. Do you recall then, having remembered that, whether or not there was an original appraisal made which was later modified by your committee?

* * * * *

The WITNESS: I have no recollection of a question framed in that way; I recollect now, from the circumstances called up, that it was so."

TESTIMONY OF THURSTON H. ROSS.

Thurston H. Ross, having been first duly sworn as a witness on behalf of the Petitioner, testified as follows: [140]

Direct Examination.

My name is Thurston H. Ross and I am a consulting engineer. I am also an appraiser and a professor at the University of Southern California. My work is primarily valuation engineering and industrial work which included subdivision layout and plant location. It has also included plant construc-

(Testimony of Thurston H. Ross.)

tion and plant location work; the plant location work has been here and in the east and the plant construction work has been primarily here.

I am in charge of the Department of Management of the University of Southern California and in connection with that department I am in charge of all of the instruction in appraisal in connection with the work. Outside of my work as a professor in the University I am also a consulting engineer. I first engaged in the business of appraising and valuation as a clerical assistant in 1913. My first work carried on as a principal was in Detroit in 1915. I have appraised property in Detroit, Michigan; Dayton, Ohio; Cincinnati, Ohio; Columbus, Ohio; Cleveland, Ohio; Los Angeles, California; San Francisco, California; Beverly Hills, Inglewood, Torrance, and most of the cities in the metropolitan area of Los Angeles. Some of the properties in Los Angeles area which I have appraised for one purpose or another are: The Central Manufacturing district of Los Angeles, industrial sites for the Santa Fe at Torrance, California; numerous properties in the downtown area along Spring Street between Second and Eighth, several properties on Broadway between Second and Tenth, a considerable number of apartment and business sites in the Wilshire District; several properties on Hollywood Boulevard in the vicinity of Grauman's Chinese Theatre; the major portion of the properties in the Beverly Hills triangle business district, all of the subdivided view and beach frontage which might be used for residential purposes between the

(Testimony of Thurston H. Ross.)

Malibu Ranch and the Orange County line. I also appraised every major industrial tract in the City of Los Angeles, [141] together with a number of specific industrial sites, such as the property of the Baker Iron Works, the Llewellyn Iron Works, the land of the Goodyear Tire & Rubber Company and the land now occupied by the plant of the Peerless Laundry Company.

I have carried on a consulting practice in industrial engineering, the major portion of which work consisted in the location and construction of industrial and business enterprises in the City of Los Angeles. During this time I have located such plants as the Pacific Coast Sales Book Company. I participated directly in the location of Barker Brothers store at 7th and Flower Streets, also in the location of their Hollywood Store in the El Capitan Building on Hollywood Boulevard. Since 1923 I have been associated actively in the Eberle Economic Service as Vice-President, and during about 80 per cent of that time as principal in charge of all economic and industrial survey work. I have written a book on real estate appraisal, which has been adopted as a text book by the California Real Estate Association and which is being used as a hand-book, not only here in California, but also in some other parts of the country. I am now in charge of appraisal work at the University of Southern California. My appraisals have been used by such firms as:

Paine Weber & Co.

Blyth, Witter & Company

(Testimony of Thurston H. Ross.)

Frick, Martin & Co.

Bank of Italy

Southern California Edison Company

Los Angeles Gas & Electric Corporation

Hunter, Dulin & Company

Merchants National Bank, now the Bank of
America

The First National Bank, now the Security-

First National of Los Angeles

First National Bank of Beverly Hills

and others of like standing. My appraisals and reports have been used in the Superior Court of California, Railroad Commission and in other governmental bodies and commissions. I have appraised 167 leases in the downtown district [142] of Los Angeles in the last several years, some of these appraisals being for financing purposes, others for rental, and still others for particular economic purposes in connection with other survey work. When I say the "central district" I refer to the area bounded by First Street, Washington Street, Maple Street and Figueroa Street. I have also appraised properties in the business districts of such towns as Beverly Hills and Hollywood. I have just appraised a lease for the First National Bank of Beverly Hills. I have appraised property in Hollywood for the purposes of rental. I have also appeared before the Superior Court and the Railroad Commission as an expert on valuation. I am also a member of the American Society of Mechanical Engineers and the American Management

(Testimony of Thurston H. Ross.)

Association, and the National Association of cost accountants.

I am acquainted with the values of leases in the downtown business part of the City of Los Angeles, particularly in the vicinity of Fifth and Broadway. I have made an examination of the property on Fifth and Broadway covered by the contract to make a lease dated November 1, 1920, between Gladys Billicke and Mr. Dohrman and Faris and Walker. I examined the property and the contract to make a lease. In my opinion the value on November 2, 1920 of the contract to make a lease dated November 1, 1920 was \$700,000.00. Its value in my opinion on May 18, 1921, was \$700,000.00; and its value on March 30, 1921, in my opinion was also \$700,000.00; its value on June 3, 1921, in my opinion, was also \$700,000.00.

Cross Examination

I first came to Los Angeles on February 4, 1921 and devoted the first eight or nine months doing research work in connection with a proposed service called the Eberle and Riggleman Economic Service. The work involved there was principally an economic study of the values in the downtown district, and the [143] cost of doing business in Los Angeles, taking into consideration the competition of outlying districts, and also the population and purchasing power of the city. That work was done in connection with three associates—John R. Riggleman, George J. Eberle and myself. After that time I taught at the University of California,

(Testimony of Thurston H. Ross.)

Southern Branch, and from about the middle of January, 1922, I started the appraisal work. However, I had quite a complete value schedule worked up, so far as the downtown district was concerned, by the middle of 1921.

“Q. What did you value in this case, Mr. Ross?

A. In this case I valued or evaluated an estate arising out of a contract to make a lease.

Q. Did the fact that that contract was a contingent one cut any figure in your valuation?

A. Yes, I went through the contract very thoroughly, together with the lease which was attached to the contract, and took into consideration all of the stipulations in that contract, and in the lease attached to it.

Q. Was it a contingent contract?

A. What was the question?

Q. Was it a contingent contract?

A. Well, I would say that I am not a lawyer, and I evaluated that on the basis of a contract to a lease, as appraisers think of it, and I looked up in Tiffany's Real Property,—a book that appraisers frequently use, before evaluating it, I found in this Tiffany's Real Property that an opinion I had seemed to be fairly well backed up, wherein it is said that a contract to lease and a lease were practically the same thing.

Q. Yes, now a contract for a lease; is there any difference between contracts for leases?

A. Is there any difference between contracts for leases?

(Testimony of Thurston H. Ross.)

Q. You say you found in Tiffany that there was not much difference between a contract for a lease and a lease?

A. Perhaps I had better read. [144]

Mr. LEMING: No, just answer the question.

The WITNESS: What is the question?

Mr. LEMING: Will you read the question?

(The pending question was thereupon read by the Reporter)

The WITNESS: No, I will not say that; I found in Tiffany's that there was much difference in value.

Q. In valuation or in evaluating?

A. I would say rather that Tiffany's said that there was not very much valuation in effect so far as value was concerned.

Q. If the contract contained a condition which was never performed, would it have any value?

A. Well, as to valuing a lease —

Q. Well, now, talking about the value of that particular contract, disassociated from any physical property.

A. I do not quite get your question.

Q. Well, do you know whether or not this contract had any contingent provisions in it?

A. There were a number of provisions in the contract and in the lease.

Q. Were they contingent?

A. As I recall, some of them were.

Q. Was there any compulsion on the parties to perform them?

(Testimony of Thurston H. Ross.)

A. Yes, there was compulsion, apparently, on the parties to perform them.

Q. What was that compulsion?

A. Well, I will have to look at my notes here to get at that.

Q. Let us look at the list, or at the contract, let us find out if we are talking about the same thing. I show you Petitioner's Exhibit No. 1, and ask you to read the documents set out on this page, which starts off by saying: 'Agreement made as of this first day of November, 1920, by and between Gladys Billicke and A. B. C. Dohrman as first parties, and W. A. Faris and R. M. Walker, as second parties, and I will ask you if this is the contract for the lease that you are talking about? [145]

A. Can I compare that with what I have here; I think it is the same thing.

Q. All right.

A. Without going through the whole thing, I believe it is the same thing,—I believe it is the negative of this photostat that I have.

Q. That is the contract, then, that you valued; is that right?

A. Yes, with the attached lease to it; you see I have the contract and the lease to it.

Q. Well, is not that a proposed lease that is attached to it?

A. Yes, that is a proposed lease, but part of the contract.

Q. All right, but it is not an executed lease, is it?

(Testimony of Thurston H. Ross.)

A. It had not been executed at that time.

Q. No, it had not been executed?

A. No.

Q. But that is what you based your value on?

A. My valuation was on that document there as a basis.

Q. Did you see an assignment of that contract dated January 2, 1921 from Walker and Faris to C. J. Milliron?

A. Yes, I did.

Q. Do you have a copy of it there with you?

A. I do not have a copy of that with me, and I am not sure since I think it over, I am not sure what date, but I saw an assignment.

Q. Well, do you know whether or not you saw an assignment dated January 2, 1921?

A. I will not be sure about the date, no, it runs in my mind that that assignment was earlier than that time, however, it may have been at that time.

Q. In examining the property down here at Fifth and Broadway, did you take into consideration the conditions which existed there at the present time?

A. Yes, sir. I took into consideration the conditions at the present time." [146]

TESTIMONY OF ALEXANDER CROMWELL.

Alexander Cromwell, having been first duly sworn as a witness on behalf of the Petitioner, testified as follows:

Direct Examination

My name is Alexander Cromwell, and I am a mechanical and structural engineer. From 1912 until 1917 I followed engineering work, superintending of construction and estimating and operating of industrial engineering projects; in connection with that work I handled a number of rights of way, agreements and leaseholds, negotiated for purchase. From 1917 until 1926 my time was exclusively devoted to valuation work, handling work for purposes of financing, insurance projects, rate setting; that covered quite a large section of the country, the cities of St. Louis, Chicago, Kansas City in the east and out here on the Pacific Coast, as well as some work in the Hawaiian Islands, in connection with mergers and invested capital reports. I negotiated a number of leases from the standpoint of a lessee and lessor, as well as appraisals of properties for purchase and sale. I have made appraisals or valuations of leaseholds in and around the downtown district of Los Angeles. Within the so-called metropolitan area of Los Angeles I handled in excess of 150 to 200 investigations on different classes of property, on commercial properties, industrials, vacant lots, and one large appraisal in connection with the highway department. In 1925 I appraised all of the lands owned by the city around the harbor district, other large appraisals, the Malibu Ranch Estate. Some

(Testimony of Alexander Cromwell.)

of the properties downtown are the Arcade Building, the leases and stores of the Owl Drug Company, in 1920 they comprised all of their stores at that time, one located at 4th and Spring, 6th and Main, 7th and Hill, 6th and Broadway, I think at that time at 5th and Hill,—all of the leases and theatres of the West Coast Theatre chain taking [147] in their downtown theatres as well as their outlying locations, the National City Bank Building site at 8th and Spring, a number of properties around this immediate location here; First and Spring, in connection with the condemnation proceedings for the extension of Spring Street; a number of valuations on Broadway for its extension and condemnation; the same on Flower Street; 10th Street widening.

On or about the latter part of 1920, or the beginning of 1921 I made an investigation of the property on Fifth and Broadway in connection with a contract between Gladys Billicke and A. B. C. Dohrman, and Faris and Walker, for the purpose of determining the value of the estate created under that contract. I am acquainted with the values in and around that location of leaseholds to real property. In my opinion the value of the estate created by the contract of November 1, 1920, between Gladys Billicke and A. B. C. Dohrman, and Faris and Walker were \$650,000.00 on November 2, 1920. In my opinion the value of the contract on May 18, 1921 was \$650,000.00; its value on March 30, 1921 was \$650,000.00 and its value on

(Testimony of Alexander Cromwell.)

June 3, 1921, in my opinion, was \$650,000.00. I did not consider that there would be any difference in value of this contract on the dates mentioned, perhaps there would be a slight increase, if any change.

Cross Examination

I was District Manager at Los Angeles for the American Appraisal Company from 1920 until 1925, during which time I was employed to make valuations. I made an investigation for the American Appraisal Company and submitted a report in 1921 covering the property. I made the investigation for the American Appraisal Company, as I recollect, in March, 1921. The American Appraisal Company was employed by Mr. Milliron to make the appraisal. I made a report of my investigation to the home office of the American Appraisal Company. [148]

“Q. What did you report as to value at that time?

A. The same figure that I just quoted—\$650,000.00.

Q. Is that the same report that you base your present testimony on?

A. No, I had nothing to do with that report of the American Appraisal Company, it was submitted from Milwaukee, I merely made my investigation and submitted my report to them, that is all.

Q. And your appraisal is of the estate created by the contract between Gladys Billicke

(Testimony of Alexander Cromwell.)

and A. B. C. Dohrman and W. A. Faris and R. M. Walker?

A. That is right.

Redirect Examination.

Q. Mr. Cromwell, with reference to the last question, at the time you made this, and as the basis of your value, your valuation was determined to be on the agreement as transferred to C. J. Milliron?

A. Yes.

Recross Examination.

Q. Did you see the transfer to Milliron?

A. See the copy of the agreement transferring —

Q. Yes.

A. Yes.

Q. What was the date of that?

A. I do not recall the date of that.

Q. What sort of a document was it that you saw?

A. I do not recall now whether it was a photostatic copy or the original typed copy."

The agreement transferring from Mr. Faris and Mr. Walker to Mr. Milliron was in the form of a letter, as I recollect; the contract was assigned as I recall about November 2d. The agreement between Billicke and Dohrman with Faris and Walker, as I recall, was dated November 1st or November 2d; [149] the day following the assignment was made from Mr. Walker and Mr. Faris to Mr. Milliron. I do not recall the exact phraseology of the as-

(Testimony of Alexander Cromwell.)

signment and did not consider there was anything unusual about it. I have seen a number of different forms of assignment of leases. I do not know that there is any set form. I do not know whether the assignment was in fact made on January 2, 1921. I saw a copy but whether it was the original copy I do not recall. The papers were given to me by Mr. Milliron or someone in his office. I did not examine the legal records here at the Hall of Records to find out if there was any assignment of this contract on record. I took the data that was furnished me and made the valuation.

The following document was offered by Respondent and received in evidence:

“Received from Faris-Walker, a partnership composed of W. A. Faris and R. M. Walker, the sum of thirty thousand dollars (\$30,000) as a bonus for the cancellation of three certain leases dated December 27, 1911, between A. C. Billicke, lessor, and Meuse, Farris Walker Company, a corporation, as lessee, under which said leases Faris-Walker now occupy the premises described therein facing on Broadway and Fifth Street, in the city of Los Angeles, California, which said payment is received on account of cancellation of said leases, in accordance with the agreement entered into November 1, 1920, between Gladys Billicke and A. B. C. Dohrman, as executors of the will of Albert C. Billicke, deceased, and W. A. Faris and R. M. Walker.

(Testimony of Alexander Cromwell.)

“Dated Los Angeles, California, this 31st day of December, 1920.

“Signed ‘Estate of Albert C. Billicke, deceased, by Arthur C. Hurt, Attorney for the Executors.’ ”

TESTIMONY OF ARTHUR C. HURT.

Arthur C. Hurt was called as a witness on behalf of the Respondent and, after being duly sworn, testified as follows:

My name is Arthur C. Hurt and I am an attorney at law. I have been a resident of Los Angeles for 24 years and have practiced law here 23 years. [150] I was attorney for the Billicke Estate from 1915 until the close of the estate, about 1922. I am acquainted with Mr. Milliron. He is the gentleman sitting at the counsel table. I recall when the Billicke Estate entered into a contract with R. M. Walker and W. A. Faris for a 99-year lease on the property at Fifth and Broadway. Mr. Page, also a lawyer, and I who were then partners represented the estate. That part of petitioner's Exhibit 1 which is the agreement made on the 1st of November, 1920, by and between Gladys Billicke and A. B. C. Dohrman as first parties, and W. A. Faris and R. M. Walker, as second parties, is the contract entered into at that time as to which I have personal knowledge. I am somewhat familiar with the old leases which were on the property at Fifth and Broadway; it has been a long time; I am not absolutely sure; I am quite positive that

(Testimony of Arthur C. Hurt.)

I know. Walker and Faris were occupying these premises on December 31, 1920. I do not know exactly how long Faris and Walker had occupied the premises prior to the 31st day of December, 1920. The old firm of Meuse, Faris & Walker was occupying all or part of the premises as early as 1906 when I came to Los Angeles. Portions of the premises were occupied at later dates as I remember it. The firm name was Meuse, Faris & Walker, or some name similar to that; predecessor of the firm of Faris & Walker. I understood that R. M. Walker and W. A. Faris were a part of the previous firm. The Walker-Faris store continued to occupy the premises from December 31, 1920 to the present time. A new building has been constructed on this land since December 31, 1920 under the terms of the new lease. Walker and Faris vacated a portion of the premises at a time. As they completed a unit they moved into the new building and tore down the old. They continued to occupy some part of the area all of the time. [151]

TESTIMONY OF R. M. WALKER.

R. M. Walker was called as a witness on behalf of the Respondent and after being duly sworn, testified as follows:

My name is R. M. Walker and I reside at 701 North Roxbury Drive, Beverly Hills. I am a merchant. My business is located at the corner of Fifth and Broadway in Los Angeles, in the build-

(Testimony of R. M. Walker.)

ing known as the Fifth Street Building. It will be 25 years on the first Monday of next October since I have occupied the premises there in business. I would have to refer to the records to state the volume of business handled there on December 30, 1920. I could not give you an approximation because I handled the merchandise end and my partner, Mr. Faris, handled the money end, and it would be very unsafe for me to make a statement. I could not state how great the purchases were, I would have to guess at it because I do not carry those things over a period of years. We clean our files every year on the merchandise end. I would prefer not to state approximately the extent of the business in volume around the end of 1920. I would furnish you all of this by copying it from the books, if you wish. We were doing a good sized business. However, that depends on who is figuring on the business. If it is a department store man, he might think it was a small business, and if it was an attorney, he might think it was a large business. That is a big question. I could get some figures which would give you an idea in general of the volume of business at December 30, 1920, in 2 or 3 or 4 hours, possibly quicker. It is just a matter of taking them off the books. I could guess at all of this but I do not believe I should. I can not state approximately the volume of business, I have to guess. A general character of the business in the trade form is a popular priced business of the department store type.

(Testimony of R. M. Walker.)

“Q. Have you any interest in the outcome of this proceeding here? [152]

A. Well, not that I know of.

Q. This is a proceeding to collect some additional taxes from the Fifth Street Building, and I want to ask you if you have any interest in the outcome of the proceeding?

A. I have not.

Q. Do you know Mr. Milliron? A. I do.

Q. Is he the counsel at the table? A. He is.

Q. Has he been your attorney?

A. He was at one time the attorney for the firm,—not my personal attorney.

Q. And by the firm you mean whom,—Walker and Faris? A. Faris-Walker.

Q. Was he the attorney for Walker and Faris in 1920?

A. Well, I would have to look that up to confirm it; he was with us several years.

Q. Several years? A. Yes.

Q. Can you say about from when—about when he was first employed?

A. I would have to refer to the records on that.

Q. Do you know about when he ceased to be an attorney for Walker and Faris?

A. When Mr. Faris sold his interest in the business.

Q. When was that?

A. Well, that is about five or six years.

Q. Five or six years ago? A. Yes, sir.

Q. About five or six years ago?

(Testimony of R. M. Walker.)

A. Yes, sir. [153]

Q. And Mr. Milliron had been attorney for the firm for approximately how long prior to that?

A. Well, for a good many years; I would have to refer to the records to make it definite.

Q. Do you remember the occasion when the contract was entered into between you and W. A. Faris and the Billicke Estate for a 99-year lease on the Fifth Street property?

A. I know of the conditions, but the exact date I would have to refer to the records.

Q. Well, you know there was such a contract entered into? A. Yes, sir.

Q. Was Mr. Milliron your attorney at that time?

A. Yes, sir; he was the attorney for the store; not for me personally.

Q. That is, he was attorney for Walker and Faris? A. Yes, Faris Walker.

Q. Mr. Walker, this lease (Respondent's Exhibit B) you just identified as having signed, shows in its first paragraph that it was executed the first day of March, 1922; I will ask you what sort of a lease you had if any on those premises from December 31, 1920 to the date of the execution of this lease?

A. I do not know."

At this point Mr. Leming requested permission to cross examine the witness, to which Mr. Milliron, on behalf of the petitioner, objected, and there-

(Testimony of R. M. Walker.)

upon the member stated that he would permit such cross examination.

“By Mr. Leming:

Q. Mr. Walker, do you not know, as a matter of fact, you did not have any contract from the date of the cancellation of your old leases until this was executed?

A. Mr. Faris was the man that always handled the leases.

Q. Just answer my question; do you not know as a matter of fact that you did not have any contract? A. No, I do not know.

Q. Do you not know, as a matter of fact, you occupied those premises on a day to day basis? [154] A. Yes, sir.

Q. You did?

A. Not day to day; we had a lease.

Q. Month to month?

A. Well, I do not know.

Q. Well, how did you occupy them from the time your old leases were cancelled and this was executed?

A. We were there and we stayed there.

* * * * *

Q. Do you not know, as a matter of fact, there was not any written contract from the time the old lease was cancelled until this was executed?

A. I could not prove it.

Q. Who did you pay your rent to from December 31, 1920 to the time this lease was executed?

(Testimony of R. M. Walker.)

A. I could not tell you; that was not my business to pay the rent.

Q. Who does know?

A. Mr. Faris knew at that time; he handled all of that end of the business, and I handled the merchandise; I never questioned his ability, and he never questioned mine, so far as things usually came, if Mr. Faris told me to sign, I signed; if I told him to sign on the merchandise, he signed; I never was in the office; I never handled any of the contracts or leases or anything of that kind; I would be misquoting myself if I told you I did know, if I do not know.

Q. Mr. Walker, you were occupying these premises on December 31, 1920, were you not?

A. We have occupied those premises constantly from the time we opened the store up to the present time, save we moved from one part of the ground to another.

Q. And you had a stock of merchandise there well over a million dollars, did you not?

A. Well, sometimes it was over a million; sometimes less.

Q. And sometimes it would run to a million and a half?

A. Yes, it might run a whole lot more. [155]

Q. Yes, and there you were, December 31, 1920, with a stock of goods worth around a million dollars; is that about right?

A. No, at that time and season it usually runs more.

(Testimony of R. M. Walker.)

Q. It runs more? A. Yes.

Q. So that your stock of goods at that time was worth more than a million dollars?

A. I imagine it was.

Q. And at that time you paid thirty thousand dollars to the Billicke Estate to cancel your leases, did you not?

A. I did not, **no**.

Q. Who did? A. Mr. Faris.

Q. Mr. Faris? A. Yes.

Q. Was part of it your money? A. Yes.

Q. All right; Walker and Faris then paid the thirty thousand dollars?

A. I could not say they did.

Q. You know you contributed to pay it, did you not?

A. No; I might have known it.

Q. It has been admitted here it was paid.

A. I say, I knew relatively that it was.

Q. There you were, with a million and a half dollars worth of goods, or whatever it was, and you paid thirty thousand dollars to cancel your leases; under what sort of an arrangement did you stay there the next day?

A. I could not tell you.

Q. Or the following months?

A. I could not tell you. [156]

Q. You do not know, so far as you were concerned, you could have vacated the next day, is that right ?

A. For all I know.

(Testimony of R. M. Walker.)

Q. How long have you been in the business, Mr. Walker?

A. It will be 25 years the first Monday of next October."

I could not tell you what my personal worth was on December 31, 1920. I could not tell you whether it was a million dollars. I could not tell you approximately how much I was worth on December 31, 1920 without looking it up. I could not tell you whether I was worth a half million dollars. I could not tell you what my income tax return for that year showed. I do not have my income tax return with me; Mr. Milliron has it possibly; he made out my return at that time. I could not tell you what Mr. Faris was worth at that time. I do not know what Mr. Milliron's financial standing was at that time. I do not know what we were paying him at that time as attorney. I would have to refer to the records.

"Q. And I believe you have already testified that you do not know how you occupied those premises from the time the old leases were cancelled until the new one was entered into March 1, 1922?

A. No.

Q. You do not know? A. No.

Q. But you were there? A. Yes, sir.

Q. And you were there with this large stock of merchandise? A. Yes, sir.

Q. And you are there yet?

A. Yes, sir. [157]

(Testimony of R. M. Walker.)

Cross-Examination.

On cross-examination by Mr. Milliron, the witness identified Petitioner's Exhibit No. 6 and the same was admitted in evidence, being the lease dated January 2, 1921, between C. J. Milliron, as lessor, and W. A. Faris and R. M. Walker, as lessees, under which the premises were occupied from the 1st day of January, 1921.

TESTIMONY OF C. J. MILLIRON.

C. J. Milliron, having been first duly sworn as a witness on behalf of the Respondent testified as follows:

My name is C. J. Milliron and I live in Los Angeles. I am President of the corporation known as the Fifth Street Building, Petitioner herein. I own all of the common stock of the corporation. I am also counsel for the corporation in this proceeding.

“Q. Will you inform the Board, Mr. Milliron, what your financial worth was in the month of November, 1920?”

A. I do not know; I do not believe I could answer that question, it not having been suggested previously.”

There is nothing in my income tax returns for the years 1919, 1920 or 1921 which shows my financial worth on or about November 2, 1920; it merely shows the income during those years in which the

(Testimony of C. J. Milliron.)

tax was paid. As to the return, I have no objection to admitting what the return shows, but I would object to the admission of the returns in evidence for the purpose of showing my financial worth. My income, subject to income tax for the year 1919, is the amount shown in the return. The exact figure is \$24,344.82. I feel, myself, that the objection made by counsel is proper; that neither the facts contained in the return, nor the return itself are admissible in this case; the return does not show what counsel pretends to be trying to prove, and the attempt to read into [158] the record statements in the return is merely an evasion of the rules of evidence by reading into the record some thing which can not be admitted in evidence in the case by proper admission, and the conduct of counsel in that case is improper; I protest against action of that kind in this case. I can not state now, off-hand, what I was worth; I would have to examine my books. The returns show nothing as to my worth; there is nothing in the return which indicates in any way what my worth is or was at that time. The returns here do not show any items of fees received from anyone, and the fees received by me from Faris-Walker in the different years were different—they were not the same in any two years, consequently it would be impossible for me to say whether my fee for a particular year was fifty thousand or fifteen thousand, because I have no way of refreshing my memory here; it has not been suggested to me prior to coming here that the question would be asked. I was

(Testimony of C. J. Milliron.)

not on a retainer basis in those years. My fees were a matter of the determination of Mr. Faris and Mr. Walker in the entire time I was their counsel. I devoted all of the time that their business required; I handled all of their affairs and kept no record of the time; there would be no way I could ascertain it; my time was my own; I merely did whatever work they sent to me, so I would have no way now, my office records would not show anything about the amount of time.

There was offered and received in evidence, a stipulation of facts, which was marked "Joint Exhibit A-1", which is in words and figures as follows: [159]

[Title of Court and Cause.]

STIPULATION AS TO FACTS.

IT IS HEREBY STIPULATED in the above entitled actions, being docket Nos. 16,627 and 29,264, that the following allegations denied in the answers to the respective petitions are admitted, and the following facts for the purpose of this trial are true, and that further proof thereof shall not be required.

1. That the allegations contained in paragraph I of the petition in case No. 29,264, that after the filing of the income tax return of petitioner for the year 1923, with the Collector of Internal Revenue

of the Sixth Collection District of California, and within the time allowed by law petitioner fully paid the tax amounting to the sum of \$2,212.98, are true.

2. That all the allegations of paragraph IX of the amended petition in case No. 16,627, and of subdivision (d) of paragraph V of the petition in case No. 29,264, are true. [160]

3. That the allegations contained in paragraph IV in the amended petition in case No. 16,627, as follows:

“That on the 15th day of January, 1921, a corporation was organized under the laws of the State of California with the corporate name of Fifth and Broadway Investment Company and the stock thereof was acquired and owned by said Gladys Bilicke individually and as guardian of her three minor children.”

are true.

4. That the allegations contained in paragraph VIII of the amended petition in case No. 16,627, as follows:

“That said lease is in full force and effect, and petitioner has been at all times since its execution, and is, the owner thereof.”

are true.

5. That all the allegations of subdivision (d) of paragraph V of the petition in case No. 29,264, and also of paragraph IX of the amended petition in case No. 16,627, are true.

6. That the copy of the agreement, dated November 1, 1920, by and between Gladys Bilicke and

A. B. C. Dohrmann, as first parties, and W. A. Faris and R. M. Walker, as second parties, contained in and made a part of the minutes of special meeting of stockholders held May 18, 1921, which minutes are marked "Petitioner's Exhibit No. 1", and filed this day, is a full, true and correct copy of the agreement between said parties referred to in the amended petition in case No. 16,627, and in the petition in case No. 29,264, and that the same was executed as alleged in said amended petition and petition.

7. That the copy of the letter dated November 2, 1920, addressed to Mr. C. J. Milliron, 611 Trust & Savings Bldg., City, and signed W. A. Faris and R. M. Walker, marked "Petitioner's [161] Exhibit "2", and this day filed, is a full, true and correct copy of the original thereof, and that the said letter was signed by said W. A. Faris and R. M. Walker on November 2, 1920, and delivered to C. J. Milliron on said date, and that the copy of the letter dated November 2, 1920, addressed to W. A. Faris and R. M. Walker and signed C. J. Milliron, attached to and made a part of said Petitioner's Exhibit "2", is a true copy of such letter, and that the said letter was signed by said Milliron and delivered to said W. A. Faris and R. M. Walker on said November 2, 1920; that said letters referred to the gift alleged in paragraph V of the Amended Petition in case No. 16,627.

8. That Petitioner's Exhibit "1" this day filed, is a full, true and correct copy of the Minutes of Special Meeting of Stockholders held May 8, 1921, of said petitioner, and also of a special meeting

of the Board of Directors held on said May 18, 1921; that said meetings were duly and regularly held; that said minutes constitute and are evidence of the agreement entered into between petitioner C. J. Milliron referred to in paragraph VII of the Amended Petition in case No. 16,627, and in subdivision (b) of paragraph V of the Petition in case No. 29,264.

9. That Petitioner's Exhibit "3" this day filed, is a full, true and correct copy of the original assignment of Clark J. Milliron and Edith M. Milliron to petitioner of aforesaid agreement made and entered into on the 1st day of November, 1920, by and between Gladys Bilicke and A. B. C. Dohrmann, as parties of the first part, and W. A. Faris and R. M. Walker, as [162] parties of the second part; that said assignment was signed and executed by Clark J. Milliron and Edith M. Milliron on May 18, 1921, and delivered to petitioner and that said assignment is the assignment referred to in Paragraph VII in the amended petition in case No. 16,627, and in subdivision (b) of paragraph V of the petition in case No. 29,264.

10. That Petitioner's Exhibit "4" this day filed, is a full, true and correct copy of the original lease dated May 20, 1921, between Fifth and Broadway Investment Company, as Lessor, and Fifth Street Building, as Lessee, of the premises therein described, and said lease is the lease referred to in paragraph VIII of the amended petition in case No. 16,627, and subdivision (c) of paragraph V of the petition in case No. 29,264; that said lease

was entered into on the 20th day of May, 1921, pursuant to votes and authorization of the respective Board of Directors of petitioner and Fifth and Broadway Investment Company, a corporation, first had and obtained; that said lease was entered into in accordance with the terms of aforesaid agreement to make a lease dated November 1, 1920, between Gladys Bilicke and A. B. C. Dohrmann, as executors, and as first parties thereto, and W. A. Faris and R. M. Walker, as second parties thereto.

11. That Petitioner's Exhibit No. "5" this day filed, is a full, true and correct copy of the original guarantee dated and executed on the 20th day of May, 1921, by and between the Fifth and Broadway Investment Company, a corporation therein described as Lessor, and W. A. Faris and R. M. Walker, therein [163] described as guarantors, which guarantee is referred to and was executed in pursuance of the terms of aforesaid agreement, dated November 1, 1920, by and between Gladys Bilicke and A. B. Dohrmann, as first parties, and W. A. Faris and R. M. Walker, as second parties.

IT IS FURTHER STIPULATED AND AGREED that aforesaid copies of aforesaid documents shall have the same force and effect as evidence as if the originals had been introduced and filed, and, further, that due execution at the time therein stated thereof and the genuineness of the signatures attached thereto shall be taken as true for the purpose of this trial.

12. That Respondent's Exhibit "A" are full, true and correct copies of the original leases dated

and executed on December 27, 1911, between A. C. Bilicke and Muse, Faris, Walker Company, a corporation, referred to in memorandum dated November 1, 1920, between Gladys Bilicke, A. B. C. Dohrmann, W. A. Faris and R. M. Walker, relating to the cancellation as of December 31, 1920 of that certain lease, the same being a portion of Petitioner's Exhibit "1" this day filed.

IT IS FURTHER STIPULATED AND AGREED that as to Respondent's Exhibit "A" that the petitioner hereby reserves the right to object to the introduction of the same in evidence if and when offered, upon the ground that the same is irrelevant, incompetent and immaterial, or any other legal ground ([164] except upon the ground that the same is a copy and not the original, or that said document was not duly executed.

DATED:, 1928.

C. M. CHAREST RCN

General Counsel

Bureau of Internal Revenue

Attorneys for Respondent.

CLARK J. MILLIRON

518 Merchants National Bank Bldg.

Los Angeles, California.

GEORGE H. P. SHAW

518 Merchants National Bank Bldg.,

Los Angeles, California.

EDW. S. BRASHEARS

910 Seventeenth Street N. W.,

Washington, D. C.

Attorneys for Petitioner. [165]

Attached to said stipulation were certain exhibits numbered Petitioner's Exhibits 1 to 5, and Respondent's Exhibit "A":

Petitioner's Exhibit 1 is as follows: [166]

PETITIONER'S EXHIBIT No. 1.
MINUTES
of
SPECIAL MEETING OF BOARD OF
DIRECTORS

Held May 18, 1921.

* * * * *

The Board of Directors met by unanimous consent, all being present in special meeting at the office of the corporation, 611 Trust & Savings Building, Los Angeles, California, on the 18th day of May, 1921, at 2:15 o'clock P. M.

The meeting was called to order by President, C. J. Milliron, Directors McLeod, Milliron and Pargellis were present, being all the members of the Board.

The Directors then signed the following written consent on the records of this meeting to the holding thereof:

WAIVER OF NOTICE OF DIRECTORS'
MEETING

We, the undersigned, being all the Directors of Fifth Street Building, a corporation, hereby waive notice of the special meeting of the Board of Directors of said corporation, held at the office and principal place of business of said corporation at 2:15 o'clock P. M. on the 18th day of May, 1921,

and sign this, our consent, on the records of said meeting to the holding thereof, and we each hereby consent to and agree that the proceedings of said meeting shall be as valid as if had and done at a special meeting regularly called and noticed.

C. J. MILLIRON

J. D. McLEOD

W. M. PARGELLIS

Directors. [167]

The meeting was called to order by the President, C. J. Milliron, the Secretary W. M. Pargellis, acting as secretary of the meeting.

J. D. McLeod was nominated as Vice President of the corporation. There being no further nominations, nominations were declared closed.

On motion duly made and seconded and carried, the Secretary was instructed to cast the ballot of all members of the board for J. D. McLeod as Vice President. The secretary announced that he had cast the ballot and Mr. McLeod was declared elected Vice-President.

On motion duly made, seconded and carried the Board of Directors took a recess until immediately after the adjournment of the special meeting of stockholders about to be held.

C. J. MILLIRON

President.

W. M. PARGELLIS

Secretary. [168]

MINUTES

of

SPECIAL MEETING OF STOCKHOLDERS

Held May 18, 1921.

Pursuant to waiver of call and notice, a special meeting of the stockholders of the Fifth Street Building, a corporation, was held at Room 611, Trust & Savings Building, Los Angeles, California, on the 18th day of May, 1921, at 2:30 o'clock P. M. The following stockholders were present in person:

Clark J. Milliron.....one share

J. D. McLeod.....one share

W. M. Pargellis.....one share

The President, Clark J. Milliron, presided, and the secretary, W. M. Pargellis acted as secretary of the meeting.

The President announced that the amount of subscribed capital stock was three shares, and that all such subscribed capital stock was present at the meeting, and also that a quorum was present.

WAIVER OF NOTICE

OF STOCKHOLDERS' MEETING

We, the undersigned, being stockholders of Fifth Street Building, a corporation, and all of the stockholders of said corporation, hereby waive notice of the special meeting of the stockholders of said corporation held at the office and principal place of business of said corporation at 2:30 o'clock P. M. on the 18th day of May, 1921, and sign this our written consent on the records of said meeting to the holding thereof, and we each hereby consent and agree that the proceedings of said meeting shall

be as valid as if had and done at a special meeting regularly called and noticed.

C. J. MILLIRON

J. D. McLEOD

W. M. PARGELLIS. [169]

After the President, Clark J. Milliron had called the meeting to order, he handed the gavel to Vice President McLeod and withdrew from the meeting, and was not present during the discussion upon and at the time of the passage of the following resolutions. During such time the Vice President presided.

On motion duly made and seconded, the following resolution was adopted:

WHEREAS, on the 1st of November, 1920, a certain contract was made and entered into by and between Gladys Billicke and A. B. C. Dohrman, as parties of the first part, and W. A. Faris and R. M. Walker as parties of the second part, wherein and whereby said parties of the first part agreed thereafter to execute a lease to the parties of the second part for a term of ninety-nine (99) years, commencing on the 1st day of January, 1921, of the premises hereinafter described upon certain terms, conditions and covenants, therein specified, which agreement and exhibits attached thereto, including the proposed lease are in the words and figures following, to wit:

(copies of said agreement and exhibit marked "B" attached thereto is to be found on p. 12 et. seq. of this Book of Minutes, and the proposed lease is to be found inserted between pages 18 and 19, and exhibit marked "C" is

to be found on page 19 et seq. of this Book of Minutes.) and

WHEREAS, on the 2nd day of January, 1921, said parties of the second part transferred to Clark J. Milliron, all their right, title and interest in and to aforesaid contract and lease to be entered into; and

WHEREAS, said parties of the first part have or are about to transfer to Fifth & Broadway Investment Company, a corporation, the land and premises covered by said lease and all interest in and to [170] said contract for lease and in and to said proposed lease; and

WHEREAS, said Clark J. Milliron has offered and agreed to transfer to this corporation all his right, title and interest in and to the aforesaid contract for a lease for and in consideration of payment to him by this corporation of the sum of Six Hundred Forty Thousand Dollars (\$640,000) to be paid to said Clark J. Milliron in capital stock of this corporation at its par value; and

WHEREAS, it appears from appraisements made by competent and disinterested parties that said contract is of the value of \$640,000, and that the terms of said lease are satisfactory and the acquirement of the same will prove advantageous and profitable to this corporation; and

WHEREAS, it is the sense of this meeting that this corporation should acquire for said sum of \$640,000. to be paid for in stock of the corporation as aforesaid, all the right, title and interests of said Clark J. Milliron in and to said contract for the lease between said Gladys Billicke and A. B. C.

Dohrman, as parties of the first part, and W. A. Faris and R. M. Walker, as parties of the second part, and further that this corporation should enter into said proposed lease as lessee upon the terms and conditions and at the rental provided:

RESOLVED: That the Board of Directors of Fifth Street Building, is hereby authorized and directed to purchase from said Clark J. Milliron all his right, title and interest in and to said contract for lease between Gladys Billicke and A. B. C. Dohrman as lessors and W. A. Faris and R. M. Walker as lessees, for and in consideration of the sum of \$640,000. to be paid to said Clark J. [171] Milliron in capital stock of this corporation at its par value, and as lessee to execute and enter into the aforesaid lease with Fifth & Broadway Investment Co., a corporation, as lessor.

On motion duly made and seconded, the following resolution was adopted.

RESOLVED, that the Board of Directors of Fifth Street Building, a corporation be and they are hereby directed, authorized and empowered to enter into on behalf of, and in the name of this corporation as lessee, that certain lease with Fifth & Broadway Investment Company, a corporation, as lessor, which lease is in the words and figures following, to-wit:

The lease here referred to is a true copy of Petitioner's Exhibit "4" except that the dates are blank, it is unsigned by the officers and the acknowledgments are blank.

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that the Board of Directors of Fifth Street Building, a corporation, be and they are hereby directed, authorized and empowered to enter into on behalf of and in the name of this corporation, with Fifth & Broadway Investment Company, a corporation, that certain agreement in words and figures following, to-wit:

(Copy of said agreement is to be found inserted at page 19, of this Book of Minutes.)

During the consideration and adoption of the foregoing resolutions, Clark J. Milliron retired from the place of meeting and took no part in the discussion and adoption of the same and during the adoption of said resolutions, J. D. McLeod, Vice-President presided at said meeting. Thereafter, Clark J. Milliron resumed the chair. [172]

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that the Board of Directors of Fifth Street Building, a corporation, is hereby authorized to dispose of Three Thousand (3000) shares of the capital stock of said corporation to any one willing to purchase the same at not less than par value for cash.

No further business coming before the meeting, on motion made, seconded and carried, the meeting then adjourned.

C. J. MILLIRON

President.

W. M. PARGELLIS

Secretary. [173]

CONTINUATION OF MINUTES
of
SPECIAL MEETING OF BOARD OF
DIRECTORS

Held May 18, 1921.

The special meeting of the Board of Directors reconvened at 3:00 o'clock P. M. on the 18th day of May, 1921, pursuant to motion, at the office of the corporation, 611 Trust & Savings Building, Los Angeles, California, immediately upon the adjournment of the special meeting of stockholders.

Present Milliron, McLeod and Pargellis, being all the directors. President Milliron presided and W. M. Pargellis, Secretary acted as secretary of the meeting.

After the president C. J. Milliron had called the meeting to order, he handed the gavel to Vice President McLeod and withdrew from the meeting, and was not present during the discussion upon, and at the passage of the two following resolutions. During such time, the Vice President presided.

On motion duly made and seconded the following resolution was adopted.

WHEREAS, on the 1st of November, 1920, a certain contract was made and entered into by and between Gladys Bilicke and A. B. C. Dohrman, as parties of the first part, and W. A. Faris and R. M. Walker, as parties of the second part, wherein and whereby said parties of the first part agreed thereafter to execute a lease of the premises therein described to the parties of the second part for a term of nintey-nine years commencing on the 1st day of January, 1921, upon certain terms, condi-

tions and covenants, therein specified, which agreement and exhibits attached thereto, including the proposed lease, are in the words and figures following, to-wit:

“AGREEMENT, made as of this 1st day of November, 1920, by and between GLADYS BILICKE and A. B. C. DOHRMANN, as first parties, and W. A. FARIS and R. M. Walker, as second parties. [174]

The first parties represent that they are the Executors of the Last Will and Testament of A. C. Bilicke, deceased, and that said estate owns real property in the City of Los Angeles, State of California, substantially described as follows:

That portion of Lot Four (4) in Block Fourteen (14) of Ord's Survey, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 53, page 66, et seq., Miscellaneous Records of said County described as follows:

Beginning at the North East corner of said Lot; thence Southerly along the Westerly line of Broadway forty-eight (48) feet; thence at right angles Westerly one hundred fifty-five (155) feet to an alley; thence at right angles Northerly along said alley forty-eight (48) feet to the North line of said Lot; thence at right angles Easterly one hundred fifty-five (155) feet to the point of beginning.

Part of Lot Five (5) in Block Fourteen (14) of Ord's Survey in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to-wit:

Beginning at the point of intersection of the Easterly line of said Lot with the center line, produced Easterly, of the party wall described in the agreement between Aaron M. Ozman and William H. Perry, dated February 5, 1896, and recorded in the Recorder's office of said County, in Book 1063 of Deeds, page 133, said point being sixty (60) feet, a little more or less, Southerly from the intersection of said Easterly line with the Southerly line of Fifth Street; thence running Westerly along said produced center line and along the center line of said wall, one hundred twenty-two (122) feet and four (4) inches, more or less, to the intersection of said center line with the center line of the party wall described in the agreement aforesaid, which runs Southerly from Fifth Street; thence Northerly along said center line sixty (60) feet, more or less, to the Southerly line of Fifth Street at a point one hundred twenty-two (122) feet and four (4) inches Westerly from its intersection with the Westerly line of Broadway as originally established, thence Westerly along said line of Fifth Street forty-two (42) feet and eight (8) inches, more or less, to the Easterly line of the alley running Northerly and Southerly through said Block; thence Southerly along the Easterly line of said alley sixty (60) feet, more or less, to an angle in said line; thence continuing along said line of alley South twenty-eight (28) degrees (28°), thirty-six and one-half minutes (36½') West sixty and thirty-nine hundredths

(60 39/100) feet, more or less, to the Southerly line of Lot Five (5) herein recited; thence along said Southerly line, Easterly one hundred fifty-five (155) feet, more or less, to the Southeast corner of said Lot Five (5); thence North-erly along the Easterly line of the same sixty (60) feet, more or less, to the point of be-ginning. [175]

subject, however, to all existing party wall agree-ments and party wall rights, if any, and also to an agreement not to use the east five (5) feet of the portion of all premises fronting on Broadway for any permanent improvement.

1. The first parties agree that they will forth-with cause a corporation to be organized under the laws of the State of California, having some suit-able name, and that they will immediately institute and take such proceedings as may be permitted by law to cause the real property to be distributed pursuant to the said Will and to be acquired by said corporation, or by said corporation and said Gladys Bilicke, to the end that Gladys Bilicke, one of the said first parties, individually, and as the guardian of her three minor children, shall own all of the issued stock of said corporation, and that said corporation, or said corporation and said Gladys Bilicke, may make a valid lease of said real property for the term of ninety-nine years. Said first parties agree that they will use every en-deavor to promptly accomplish the above and fore-going results.

2. The second parties agree that they will cause a corporation to be organized under the laws of

the State of California having some suitable name, for the purpose of leasing the said real property for a term of ninety-nine (99) years commencing January 1, 1921. And the first parties agree that when the said real property shall be acquired by the corporation to be organized by them in accordance with the provisions of this agreement, they will cause said corporation or said corporation and said Gladys Bilicke, to execute, as Lessor, an indenture of lease substantially in the form of the document attached hereto and marked "A". The second parties agree that they will thereupon cause the said corporation to be organized by them, as aforesaid, to execute, as Lessee, the said indenture of lease, and that they, as individuals, will at the same time execute in favor of the Lessor a guaranty substantially [176] in the form of the document attached hereto and marked "B". It is agreed between the parties that at the time of the execution of the indenture of lease marked "A", there shall also be executed by the parties thereto a supplemental agreement substantially in the form of the document attached hereto marked "C".

It is understood that the exact description of the said real property to be covered by and contained in said lease is to be furnished by V. J. Rowan, Surveyor, or by the Title Insurance and Trust Company of Los Angeles.

WITNESS the hands and seals of the parties hereto, the day and year first above written.

GLADYS BILICKE

A. B. C. DOHRMANN

W. A. FARIS

R. M. WALKER [177]

November 1, 1920

It is further agreed that in consideration of the cancellation as of December 31, 1920, of the present lease held by the second parties on the above described property, the second parties will pay to the first parties Thirty Thousand Dollars (\$30,000.00) on December 31, 1920, and in the event of a failure to execute the proposed lease annexed hereto and marked "A", the said Thirty Thousand Dollars (\$30,000.00) shall be returned to the second parties with interest at the rate of six per centum (6%) per annum, in which said event said present lease shall remain in full force and effect.

GLADYS BILICKE

A. B. C. DOHRMANN

W. A. FARIS

R. M. WALKER [178]

"B"

THIS AGREEMENT made and entered into this _____ day of _____ 19____, by and between

a corporation, organized and existing under the laws of the state of California, and having its principal place of business in the city of Los Angeles, California (hereinafter described as "LESSOR"), and W. A. FARIS and R. M. WALKER, of the city of Los Angeles, (hereinafter described as "GUARANTORS")

WITNESSETH:

That WHEREAS, the Lessor is about to enter into a certain lease with the Fifth Street Building,

a corporation, as Lessee, which said lease is for a term of ninety-nine (99) years, from and after January 1, 1921, and covers property situated in the city of Los Angeles, state of California, therein described. A copy of said proposed lease is annexed hereto, marked Exhibit "A", and is hereby referred to and made a part hereof, for all purposes of this agreement with like force and effect as though herein set out at length; and

WHEREAS, it is to the benefit and advantage of the Guarantors that said lease should be entered into by said Lessor; and

WHEREAS, said Lessor would not enter into said lease save for the guarantees and obligations hereinafter set forth and assumed by said Guarantors with respect to said lease;

NOW, THEREFOR, in consideration of the sum of TEN DOLLARS (\$10.00), and for other valuable considerations, the receipt whereof is hereby acknowledged, said Guarantors do hereby jointly and severally guarantee and agree as follows:

1. Said Guarantors do hereby jointly and severally guarantee the full and faithful performance by the Lessee of each and all the terms and [179] provisions set forth in ARTICLE III OF SAID LEASE, with relation to the construction of new buildings upon the demised premises.

- (2) Said Guarantors do hereby jointly and severally guarantee the faithful performance by the lessee of each and every term, condition, provision and obligation contained in said lease, and therein provided to be performed by the lessee thereunder; provided, however, that all obligation and liability

of the Guarantors and each of them hereunder shall wholly cease and determine from and after the date on which said new building shall have been fully completed and paid for, and that after said date said Guarantors or either of them shall not have any liability or obligation whatsoever with respect to said lease.

IN WITNESS WHEREOF, said

a corporation, has caused this agreement to be executed under its corporate name and its corporate seal to be affixed by its President and Secretary, thereunto duly authorized by a resolution of its Board of Directors, and said Guarantors have hereunto subscribed their names as of the day of

.....

By.....President

(Corporate Seal)

By.....Secretary

.....

.....

(The lease here referred to is a true copy of Petitioner's Exhibit "4" except that the dates are blank, it is unsigned by the officers and the acknowledgements are blank.)

WHEREAS, on the 2nd day of January, 1921, said parties of the second part transferred to Clark J. Milliron, all their right, title and interest in and to aforesaid contract and lease to be entered into; and [180]

WHEREAS, said parties of the first part have or are about to transfer to Fifth & Broadway Investment Company, a corporation, the land and

premises covered by said lease and all interest in and to said contract for lease and said proposed lease; and

WHEREAS, said Clark J. Milliron has offered and agreed to transfer to this corporation all his right, title and interest in and to the aforesaid contract for a lease, and lease for and in consideration of payment to him by this corporation of the sum of Six hundred forty thousand (\$640,000) Dollars to be paid to said Milliron in capital stock of this corporation at its par value; and

WHEREAS, it appears from appraisements made by competent and disinterested parties that said contract is of the value of \$640,000. and that the terms of said lease are satisfactory and the acquirement of the same will prove advantageous and profitable to this corporation; and

WHEREAS, it is the sense of this Board of Directors that the corporation should acquire for said sum of \$640,000. to be paid for in stock of the corporation as aforesaid, all the right, title and interests of said Clark J. Milliron in and to said contract for the lease; and further that this corporation should enter into said proposed lease as lessee upon the terms and conditions and at the rental provided, and

WHEREAS, the stockholders of said Fifth Street Building at a special meeting heretofore held on this 18th day of May, 1921, have authorized and directed this Board to acquire said interests of said Clark J. Milliron, in consideration of said 6400 shares of said capital stock and to enter into said lease.

RESOLVED: That Fifth Street Building, a corporation do purchase from said Clark J. Milliron all his right, title and interest in and to [181] said contract for lease between Gladys Bilicke and A. B. C. Dohrman as lessors and W. A. Faris and R. M. Walker, as lessees, for and in consideration of the sum of \$640,000. to be paid to said Clark J. Milliron in capital stock of this corporation at its par value, and as lessee to execute and enter into the aforesaid lease with Fifth & Broadway Investment Co., a corporation as lessor; and

RESOLVED further, that upon aforesaid execution and delivery of sufficient assignment and conveyances conveying and transferring all aforesaid right, title and interest of said Milliron in and to said contract for a lease, the president and secretary are authorized and directed to issue a certificate or certificates representing 6400 shares of stock to said Clark J. Milliron, or his order.

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that the President and Secretary of Fifth Street Building, a corporation, be and they are hereby authorized and directed, in its corporate name and under its corporate seal, to execute and deliver to Fifth & Broadway Investment Company, a corporation that certain lease, which is in the words and figures following, to-wit:

(See Petitioner's Exhibit 4)

(The lease here referred to is a true copy of Petitioner's Exhibit "4" except that the dates are blank; it is unsigned by the officers and the acknowledgements are blank.) [182]

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that the president and secretary of Fifth Street Building, a corporation be, and they are hereby authorized and directed, in its corporate name and under its corporate seal, to execute and deliver to Fifth & Broadway Investment Company, a corporation, that certain agreement in the words and figures following, to-wit:

“C”

“NOW, THEREFORE, in consideration of the premises, and as a part of a single transaction with the execution of this lease, and in consideration of the considerations therein recited, the lessee covenants and agrees that in the event it exercises the option given in Section 11, Article III of said lease to erect a building upon said lands demised, and upon the adjoining lands to the north and east in a single unit, without rows of piers, columns and horizontal supports upon the common property line, then and in that event, said lessee will construct said new building with steel frame.

It is further understood and agreed that the lessee will not assign said lease without at the same time delivering to the assignee a copy of this instrument.”

During the consideration and adoption of the foregoing resolutions, C. J. Milliron retired from the place of meeting and took no part in the discussion and adoption of the same and during the adoption of said resolution J. D. McLeod, Vice-President presided at such meeting.

On motion duly made and seconded the following resolution was adopted:

RESOLVED that, conditioned upon the securing of a permit from the Corporation Commissioner of California, Fifth Street Building, a corporation do sell and dispose of 3000 shares of the capital stock of said corporation [183] to anyone willing to purchase the same at not less than its par value for cash.

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that the president and secretary be and they are hereby authorized and directed to make application to the State Corporation Commissioner on behalf of this corporation for permission;

1. To issue 6400 shares of the capital stock to Clark J. Milliron in payment of the purchase and transfer by him to this corporation of all the right, title and interest of said Milliron in and to certain leasehold interests as provided by resolution of this Board adopted at this meeting.

2. To sell for not less than par value for cash three thousand (3000) shares of the capital stock of this corporation as authorized by resolution of this Board adopted at this meeting.

On motion duly made and seconded, the following resolution was adopted:

RESOLVED, that this corporation, Fifth Street Building open an account with Citizens National Bank, doing business in the City of Los Angeles, California, and that the funds of this corporation be deposited therein, such account to be in the name

of this corporation; that such funds so deposited be withdrawn only by check signed by the secretary-treasurer and countersigned by the President; that the secretary-treasurer be and he is hereby authorized and directed to carry this resolution into effect, and to deposit in said bank all funds now in his hands, or that may hereafter come into his hands as secretary-treasurer.

No further business coming before the Board, on motion made, seconded and carried the meeting adjourned.

C. J. MILLIRON

President.

W. M. PARGELLIS

Secretary. [184]

Petitioner's Exhibit 2 is as follows:

PETITIONER'S EXHIBIT No. 2.

FARIS—WALKER

THE 5th STREET STORE

Importers, Jobbers, Retailers

Merchandise

Los Angeles, Cal.

November 2nd, 1920.

BROADWAY & 5th STREETS

Mr. C. J. Milliron

611 Trust & Savings Bldg.

City.

Dear Mr. Milliron:

In consideration of your assuming all of the duties and obligations imposed upon us by reason of our contract to execute a lease dated November

1st, 1920, between Gladys Billicke and A. B. C. Dohrmann and ourselves as second parties, a copy of which agreement is attached, we hereby give and assign to you all our right, title and interest in said agreement, it being understood that you are to assume all of our obligations either directly or indirectly imposed as result of this agreement.

W. A. FARIS

R. M. WALKER [185]

November 2nd, 1920.

W. A. FARIS

&

R. M. WALKER

Gentlemen:

Your gift to me today of your contract of November 1st to execute a lease on the premises generally known as the "Billicke" properties, is hereby accepted and I agree to assume all your obligations thereunder and to hold you free and clear of any liabilities as a result thereof.

I will cause to be prepared an assignment of this contract executed in due form for the purpose of record.

Respectfully,

C. J. MILLIRON [186]

Petitioner's Exhibit 3 is as follows:

PETITIONER'S EXHIBIT No. 3.

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS:

That we, CLARK J. MILLIRON and EDITH M. MILLIRON, of the City of Los Angeles,

County of Los Angeles, State of California, parties of the first part, for value received, receipt whereof is hereby acknowledged *due* by these presents, sell, transfer, assign and set over unto Fifth Street Building, a corporation, organized and existing under the laws of the State of California, and having its principal place of business at said City of Los Angeles, party of the second part, all our right title and interest of every kind and nature in and to the following property, to wit:

(1) All our right, title and interest in and to that certain agreement made and entered into on the 1st day of November, 1920 by and between Gladys Bilicke and A. B. C. Dohrmann, as parties of the first part and W. A. Faris and R. M. Walker as parties of the second part, for a lease of certain property situated in said City of Los Angeles, and being portions of lots 4 and 5, Block 14 of Ord's Survey in said City, as per map recorded in Book 53, page 66 et seq. Miscellaneous records of said County, reference being had to said agreement for a more particular description, together with all our right, title and interest in and to the other and further agreements referred to therein, and which said agreement was on the 2nd day of January, 1921, transferred by said W. A. Faris and R. M. Walker to said [187] Clark J. Milliron, one of the parties of the second part.

(2) All our right, title and interest in and to that certain lease of the above referred to property, to be entered into by and between Fifth and Broadway Investment Company, a corporation, as lessor

and successor in interest of Gladys Bilicke and A. B. C. Dohrman and Fifth Street Building, a corporation, as lessee and successor in interest of W. A. Faris and R. M. Walker and of said Clark J. Milliron, as assignee of said W. A. Faris and R. M. Walker, which lease is for a term of ninety-nine (99) years beginning on the 1st day of January, 1921, and ending on the 31st day of December, 2019.

To have and to hold said property and said demised premises unto the party of the second part, its successors and assigns.

This instrument is executed in duplicate.

IN WITNESS WHEREOF, parties of the first part hereunto set their hands and affix their seals this 18th day of May, 1921.

CLARK J. MILLIRON (Seal)

EDITH M. MILLIRON (Seal)

State of California,

County of Los Angeles.—ss.

On this day of June, in the year one thousand nineteen hundred and twenty one, before me, Notary Public in and for the said Los Angeles County, State of California, personally appeared CLARK J. MILLIRON and EDITH M. MILLIRON, his wife, known to me to be the persons whose names are subscribed to the within instrument, and they and each of them [188] acknowledged to me that they and each of them, respectively, executed the same.

IN WITNESS WHEREOF, I have hereunto

set my hand and notarial seal, the day and year in this certificate first above written.

.....
 Notary Public in and for the County of
 Los Angeles, State of California. [189]

—————

Petitioner's Exhibit #4 was a lease of the premises occupied by Faris-Walker and was executed between Fifth and Broadway Investment Company, a corporation, as Lessor, and Fifth Street Building, a corporation as Lessee on the 20th day of May, 1921, for a term of ninety-nine (99) years, from the 1st day of January, 1921, to the 31st day of December, 2019, for a rental of \$50,000.00 per year, payable quarterly on the 1st days of January, April, July and October of each year, together with all taxes, assessments and fire insurance. It further provided that the lessee was to remove the buildings located on the premises and erect a re-inforced concrete, fireproof, store and loft building, to contain at least eight stories and a basement, and authorizing the lessee to assign the leasehold interest at any time without consent of the lessor, so long as the lease was not in default, and providing for termination of the lease on failure of the lessee to rectify any default after ninety (90) days written notice.

—————

Petitioner's Exhibit No. 5 is a guarantee signed by W. A. Faris and R. M. Walker, in favor of Fifth and Broadway Investment Company, by which

the full and faithful performance of the terms of the lease were guaranteed until the building provided in said lease should be erected and paid for.

Respondent's Exhibit "A", which was later introduced in evidence as Respondent's Exhibit A-1, A-2 and A-3, was a series of three leases, executed on the 27th day of December, 1911, between A. C. Billicke and Muse-Faris-Walker Co., a corporation, under which leases the premises occupied at Fifth and Broadway was leased from the 1st day of November, 1912, until the 31st day of October, 1922, for a rental of \$8000.00 per month, payable on the 1st day of each month, together with water, electricity, lighting and heating charges, and every other charge, lien or expense, except street assessments and taxes on the interest of the lessor. Attached to said leases were duly executed [190] assignments by Muse-Faris-Walker Co. to R. M. Walker and W. A. Faris, doing business under the firm name and style of Faris-Walker, The Fifth Street Store, which assignments were dated December 22, 1916, and were duly accepted by the lessor.

There was offered by Petitioner and received in evidence as Petitioner's Exhibit No. 6, a lease dated January 2, 1921, between Clark J. Milliron, first party, and W. A. Faris and R. M. Walker, co-partners, second parties which lease was in words and figures as follows: [191]

PETITIONER'S EXHIBIT NO. 6.

THIS INDENTURE, made the 2d day of January, 1921, by and between CLARK J. MILLIRON, the party of the first party, and W. A. FARIS and R. M. WALKER, copartners doing business under the firm name and style of FIFTH STREET STORE, the parties of the second part, WITNESSETH:

The party of the first part does by these presents, demise and lease unto the parties of the second part, those certain premises situate in the City of Los Angeles, County of Los Angeles, State of California, now occupied by the parties of the second part, with frontage on Fifth Street and Broadway, said premises being more fully and particularly referred and described in a certain lease entered into between the FIFTH AND BROADWAY INVESTMENT COMPANY, a corporation to be formed as set forth in a certain agreement, dated November 1, 1920, between Gladys Billicke and A. B. C. Dohrmann, first parties, and W. A. Faris and R. M. Walker, second parties, which agreement has heretofore been transferred and assigned to Clark J. Milliron, from the 1st day of January, 1921, to the 31st day of December, 1921, and for such longer time after the expiration of the said one year as the parties hereto shall agree, at the rent or sum of One Hundred and Fifty Thousand (\$150,000.00) Dollars, payable in gold coin of the United States of America, in twelve equal installments of Twelve Thousand Five Hundred (\$12,500.00) Dollars each on the first day of each and

every month during said term in advance. In addition to the amount of said rental, the parties of the second part agree to pay and discharge all special assessments, [192] ordinary and extra ordinary, levied or assessed, or which may become due or payable against said demised premises, or any part thereof, during said demised period and said parties of the second part also agree to keep said premises, during said term, fully insured as required by said original lease, it being understood that this lease is a subleasing of said premises subject to the terms and provisions of said original lease above referred to and the conditions, covenants and provisions of the same are hereby incorporated into and made a part of this lease, provided, however, that the second parties hereto shall not be under obligation to pay or discharge any amount to be paid under said original lease except as herein provided.

The parties of the second part do hereby covenant, promise and agree to pay said party of the first part, the said rent in the manner herein specified, and that at the expiration of said term, said parties of the second part will quit and surrender said premises in as good state and condition as reasonable use and wear thereof will permit (damages by the elements excepted). The said party of the first part does hereby covenant, promise and agree that said parties of the second part, paying said rent, and performing the covenants aforesaid shall and may peaceable and quietly have, hold and enjoy said premises for the term aforesaid.

IT IS FURTHER AGREED, that this lease, and the covenants and agreements herein contained, shall be binding upon the parties hereto, their executors, administrators, heirs, [193] personal representatives and assigns.

IN WITNESS WHEREOF the parties hereto have set their hands and seals, the day and year first above written.

FIFTH STREET STORE (Seal)

By W. A. FARIS (Seal)

R. M. WALKER (Seal)

CLARK J. MILLIRON (Seal)

State of California,

County of Los Angeles.—ss.

On this 2nd day of January, 1921, in the year one thousand, nine hundred and twenty-one, before me, Louise Wulff, a Notary Public in and for the County of Los Angeles, State of California, personally appeared CLARK J. MILLIRON, W. A. FARIS and R. M. WALKER, known to me to be the persons whose names are subscribed to the written instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal, at my office in said County, the day and year first above written.

LOUISE WULFF,

Notary Public in and for the County of Los Angeles, State of California. [194]

There was offered by Respondent and received in evidence as Respondent's Exhibit A-1, A-2 and A-3, the leases dated December 27, 1911, between A. C. Billicke and Muse-Faris-Walker Co., and referred to herein as Exhibit A to "Joint Exhibit A-1", the terms of which are set out above.

There was offered by Respondent and received in evidence, as Respondent's Exhibit B, a lease between Fifth Street Building, lessor, and Faris-Walker, a corporation, lessee, executed on the 29th day of March, 1922, for a period of thirty years, from the first day of March, 1922, to the 28th day of February, 1952, at a rental of \$12,500.00 for the months of March, April and May, 1922, and \$13,333.00 each month for the remainder of the term, payable monthly in advance, together with all taxes, assessments and insurance, and further provided that the lessor, petitioner herein, was to remove the buildings then located on the premises and erect a new building thereon, as provided by the ground lease. It provided further that on completion of the building, the lessee would fully equip and furnish the same as a first class department store. [195]

Petitioner, Fifth Street Building, tenders and presents the foregoing as a statement of evidence in these cases and prays that the same be approved by the United States Board of Tax Appeals and

made a part of the record in these cases.

CLARK J. MILLIRON,
GEORGE H. P. SHAW,
518 Fidelity Building,
Los Angeles, California.
THOMAS R. DEMPSEY,
A. CALDER MACKAY.

[Endorsed]: Approved and ordered filed this 12th day of May, 1933. (Signed) Stephen J. McMahon, Member.

[Endorsed]: United States Board of Tax Appeals. Filed May 12, 1933. [196]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within the time provided by the rules of that court in this respect, as extended, a transcript of record for review herein consisting of the following documents:

1. The docket entries of the proceedings before the United States Board of Tax Appeals.
2. (a) Amended Petition in Docket No. 16627.
(b) Amended Answer in Docket No. 16627 which shall include the admissions made at the time of the hearing which are as follows:

“The Respondent admits that the net in-

come for the year 1921, on which the Respondent determined a deficiency for the said year 1921 was \$87,361.96. [197]

“Admits that the Respondent in determining the taxable income for the year 1921 as \$87,361.96 did not allow an amount of \$6,464.64, or any other amount on account of depreciation on an alleged leasehold.

“Admits that should the Board find that the taxpayer is entitled to a deduction from its income for the year 1921 on account of depreciation of an alleged leasehold, that the amount so determined by the Board should be deducted from the aforesaid net income of \$87,361.96.

“It is admitted that the invested capital of Petitioner has been determined by the Commissioner to be \$8904.64.”

Stipulated and made part of statement of evidence.

3. (a) The Petition in Docket No. 45537.
- (b) The Answer in Docket No. 45537, together with the amendments made at the hearing which are as follows:

“In the case of Docket 45537, paragraph 5-(f) the Respondent admits that the net income for the year 1926 on which the Respondent determined a deficiency for the said year 1926 was \$31,064.70.

“Admits that the Respondent in determining the taxable income for the year 1926 as \$31,064.70 did not allow an amount of

\$6464.65 or any other amount on account of depreciation on an alleged leasehold. Admits that should the Board find that the taxpayer is entitled to a deduction from its income for 1926 on account of depreciation of an alleged leasehold, that the amount so determined by the Board should be deducted from the aforesaid income of \$31,064.70.

“Now, as to the year 1926, covered by Docket 45537, the Respondent admits that the Petitioner paid \$3051.01 in tax on the original return.”

4. Findings of Fact and Opinion promulgated on November 23, 1931. Respondent's Notice of Settlement and Statement of Proposed determination of deficiency filed on January 6, 1932.
5. Petitioner's motion to reconsider such opinion and also for rehearing filed January 12, 1932.

Respondent's motion for the reconsideration of such opinion and the amending thereof to include therein the cost of lease to the Petitioner filed January 25, 1932.

6. Respondent's motion and corrected notice of settlement requesting leave to withdraw the notice of settlement theretofore filed January 26, 1932. [198]
7. Petitioner's objections, filed February 5, 1932, to Respondent's motion which was filed on January 26, 1932.
8. Petitioner's motion filed March 5, 1932, for a reopening of the record and an amendment of the petition and reconsideration and rehearing.

9. The Board's memorandum, opinion and order dated March 15, 1932.
10. The Board's decision entered March 16, 1932.
11. Petition for Review and notice of filing, with acknowledgment of service.
12. Statement of Evidence, as settled and allowed.
13. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in transcript.)

Los Angeles, California.

....., 1932.

CLARK J. MILLIRON,
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Los Angeles, California.
THOMAS R. DEMPSEY,
A. CALDER MACKAY,
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Attorneys for Petitioner.

Service of a copy of the within Praecipe is hereby admitted this 10th day of December, 1932.

C. M. CHAREST,
Attorney for Respondent. [199]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 199, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 9th day of June, 1933.

(Seal)

B. D. GAMBLE,

Clerk United States Board of Tax Appeals.

[Endorsed]: No. 7198. United States Circuit Court of Appeals for the Ninth Circuit. Fifth Street Building, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 23, 1933.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.